

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

Opinion No. 2017-UP-264 (Filed June 28, 2017)

Appellate Case No. 2017-001896

COPY

Jerry Hogan. Respondent,

v.

Corder and Sons, Inc. Petitioner,

APPENDIX

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OCT 11 2017

S.C. SUPREME COURT

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AUG 23 2016

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appeal No. 2016-000259

RECORD ON APPEAL

Jerry Hogan Respondent.

v.

Corder & Sons, Inc. Appellant

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013-CP-32-03076

Jerry Hogan

Corder and Sons, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Other: _____
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

000003

Handwritten signature/initials

Circuit Court Judge

2138

1/19/2016

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on, and a copy mailed first class or placed in the appropriate attorney's box on 1/27/16 to attorneys of record or to parties (when appearing pro se) as follows:

Bradd W. Bunce 2821 Millwood Avenue/P.O. Box 1698
Columbia, SC 29202

Jonathan R. Hendrix 206 East Main Street/P.O. Box 849
Lexington, SC 29071

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg / KPK

Court Reporter

Beth Carrigg Lexington County Clerk Of Court -
Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Defendant's Motion for Judgment Notwithstanding the Verdict or, in the alternative, for a New Trial is hereby denied. Defendant's request for a hearing on its motion is respectfully denied.

FILED
2016 JAN 22 AM 11:11
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Jerry Hogan,

Plaintiff,

v.

Corder and Sons, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Civil Action No.: 2013-CP-32-03076

VERDICT FORM

1. Was the defendant negligent?
☒ YES - Go to Question 2
☐ NO - Stop deliberations
2. Was the defendant's negligence a proximate cause of the plaintiff's injuries?
☒ YES - Go to Question 3
☐ NO - Stop deliberations
3. Was the plaintiff negligent?
☐ YES - Go to Question 4
☒ NO - Go to Question 7
4. Was the plaintiff's negligence a proximate cause of the plaintiff's injuries?
☐ YES - Go to Question 5
☐ NO - Go to Question 7
5. Using the combined negligence that proximately caused the plaintiff's injuries as one hundred percent (100%), what percentage of that negligence is attributable to the plaintiff and what percentage is attributable to the defendant? [The percentage must add up to 100%. It is not necessary for each defendant to be assigned a percentage of negligence. It is perfectly acceptable for a defendant to be assigned a zero percentage (0%).]

Plaintiff _____ %

Defendant _____ %

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Total _____ %

-Proceed to Question 6

6. Was the plaintiff's negligence greater than fifty percent?

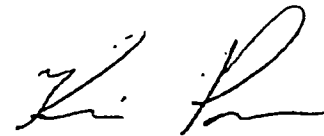
_____ YES - Stop deliberations

_____ NO - Go to Question 7

7. Please state the amount of damages, if any, sustained by the plaintiff. [Do not reduce the plaintiff's total damages based on the percentage of negligence by any party. After you have answered these questions, the judge will compute the amount of damages for which the defendant is responsible based on the percentage of the defendant's negligence which you have decided proximately caused the plaintiff's injuries. You are to determine only the total amount of the plaintiff's damages and enter that amount below.]

\$ 864,341.80 Actual Damages

\$ _____ Punitive Damages



Foreperson

January 6, 2016
Lexington, South Carolina

000006

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Jerry Hogan,

Plaintiff,

v.

Corder and Sons, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-32-03076

**NOTICE OF MOTION AND MOTION
FOR JUDGMENT NOTWITHSTANDING
THE VERDICT OR ALTERNATELY
FOR A NEW TRIAL**

TO: BRADD W. BUNCE, ESQUIRE, ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through his undersigned counsel, shall move before the Honorable D. Garrison Hill, who was the presiding Judge of the Court of Common Pleas for Lexington County, Eleventh Judicial Circuit, during the trial of the above-captioned matter, such place as the court may direct, on the 10th day after the service hereof or at such other time as Counsel may agree or the Court may order, for an Order granting this Defendant Judgment Notwithstanding the Verdict or, alternately, for a new trial on the grounds that there is no sufficient legal or factual basis to support the jury's findings of liability against the Defendant in this case. Particularly, Plaintiff did not provide any evidence of Defendant's negligence in the design, maintenance and/or use of the modified forklift that is the subject matter of this litigation, nor did Plaintiff provide any explanation as to how the modified forklift failed.

Additionally, this lack of evidence as to what caused the front end loader, capable of holding three times the weight of the SUV it was holding, to not hold the SUV safely forced the jury to have to base its decision that Defendant was liable upon speculation, surmise and conjecture which is not permitted under South Carolina law.

#10A N

Further, the jury's verdict of liability against Defendant without any comparative negligence on behalf of the Plaintiff in light of the overwhelming evidence that the reason the front end loader did not hold the SUV was because of the manner in which Plaintiff set it up or operated the loader (without permission or instruction) indicates that passion, prejudice or some other improper motive or factors influenced the jury's decision.

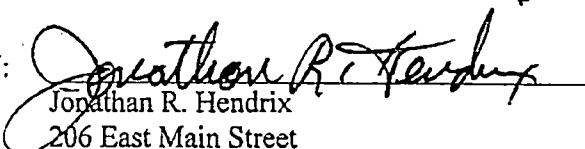
Further still, the jury's decision in light of the lack of proof or explanation of how the front end loader come to not safely hold the SUV would mean the unrecognized theory of *res ipsa loquitur* had an important part to play in this verdict and must not be allowed to stand.

Lastly, there is a failure of proof that any act or omission of the Defendant was factual and/or legal proximate cause of Plaintiff's injuries.

Said motion shall be based upon the sworn testimony and/or exhibits presented at trial and other arguments that may be heard at the hearing on this matter together with such legal authorities that may be presented at the hearing on this matter.

WILLIAMS, HENDRIX, STEIGNER & BRINK, P. A.

BY:


Jonathan R. Hendrix
206 East Main Street
P.O. Box 849
Lexington, SC 29071
(803) 359-1550
ATTORNEY FOR DEFENDANT

LEXINGTON, SOUTH CAROLINA

January 15, 2016

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FILED

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)
Jerry Hogan,)
)
Plaintiff,)
)
v.)
)
Corder and Sons, Inc.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-32-____

2013 SEP-6 P 2:05
DETHA-PARKER
CLERK OF COURT
LEXINGTON, SC

COMPLAINT

(Personal Injury)
(Jury Trial Requested)

2013CP3203076

The Plaintiff alleges:

A. PARTIES

1. The Plaintiff, Jerry Hogan, is a resident of Lexington County, South Carolina.
2. The Defendant, Corder and Sons, Inc., is a corporation organized under the laws of South Carolina, with a principal place of business in Lexington County, South Carolina.

B. JURISDICTION & VENUE

3. The Court has jurisdiction over this case and these parties under S.C. Const. art. V, § 11.
4. Venue is proper in Lexington County because the acts and/or omissions occurred in this county, which is also the county of the Defendant's principal place of business, under the common law of South Carolina and S.C. Code Ann. § 15-7-30 (Supp. 2005).

C. FACTS

5. On or about February 18, 2011, the Plaintiff was working at the Defendant's principal place of business at 3626 Pond Branch Road, near the Town of Leesville, Lexington County, South Carolina.
6. Plaintiff was removing a part from a sport utility vehicle (SUV) at the Plaintiff's

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direction.

7. The SUV was lifted from the ground by a front loader previously modified by Defendant to function as a forklift.

8. The Defendant had caused the bucket from its front loader to be removed and forks to be installed in its place.

9. The only other potential support for the dangling SUV was a single piece of metal wedged between the ground and either the forks or the SUV.

10. Plaintiff was working under the SUV, which was suspended overhead.

11. Suddenly and without warning, the SUV fell directly onto the Plaintiff from above, resulting in significant physical injury to the Plaintiff.

D. FOR A FIRST CAUSE OF ACTION
(Negligence)

12. Plaintiff realleges here the paragraphs above as if restated verbatim.

13. This collision was caused solely by the Defendant.

14. The Defendant had a duty to provide a safe workplace for Plaintiff, to exercise due care in designing lifting equipment and supports, and to exercise due care in training Plaintiff in techniques to safely work under suspended loads. The Defendant, through its agents' and employees' actions and omissions, breached its duties.

15. Plaintiff's injuries and damages were caused by the Defendant's negligent, careless, or reckless conduct in one or more of the following ways:

- (a) Defendant directed Plaintiff to work under a raised load without the load being secured;
- (b) Defendant failed to warn Plaintiff of the dangers involved in working under a raised load;
- (c) Defendant failed to train Plaintiff in procedures, techniques, or the equipment necessary to allow safe work under a raised load;

- (d) Defendant failed to maintain a workplace which is free of recognized hazards which may cause death or serious physical harm, in violation of SC Reg § 71-112A;
- (e) Defendant designed a modification to the front loader that allowed it to be used in an unsafe manner for which it was never intended;
- (f) Defendant designed and constructed a support mechanism that was inadequate to safely support the raised loads for which it was intended;
- (g) Defendant failed to provide adequate supervision or any means of warning of a shifting load suspended above the Plaintiff; and
- (h) Defendant failed to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances.

16. As a direct and proximate result of the aforesaid acts or omissions of the Defendant, the Plaintiff suffered significant physical injuries; his injuries were of such a nature as to require him to expend monies for hospitalization, doctors' care, and other medical necessities, and he will have additional medical expenses in the future; he has suffered and will continue to suffer physical impairment; he lost time and earnings from work and will lose earnings in the future; he was subject to extreme pain, mental anguish, suffering and discomfort over a long period of time and will suffer the same in the future; he suffered alteration of his lifestyle; and he was unable to pursue many of his usual avocations in the past and will continue to suffer the same in the future, thereby being deprived of the enjoyment of life, all to his damage in an appropriate amount.

E. PRAYER

FOR THESE REASONS, Plaintiff asks for judgment against Defendant for the following:

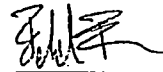
- a. Actual damages in an appropriate amount;
- b. Punitive damages in an appropriate amount;
- c. The costs of this action; and

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d. All other relief the Court deems appropriate.

Respectfully submitted,

Green Law Firm, LLC



Bradd W. Bunce
Attorney for the Plaintiff
2821 Millwood Avenue
Post Office Box 1698
Columbia, South Carolina 29202
(803) 771-2455 voice
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bradd@bill-green.com

August 19, 2013
Columbia, South Carolina.

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STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Jerry Hogan,)

2013 NOV -5 A 11: 06

Plaintiff,)

Civil Action No.: 2013-CP-32-03076

vs.)

ANSWER

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Corder & Sons, Inc.,)

Defendant.)

The Defendant, Corder & Sons, Inc., answering the Complaint of the Plaintiff would respectfully allege and show unto this Honorable Court as follows:

FOR A FIRST DEFENSE
(12(b)(6))

Defendant would show that Plaintiff has failed to allege facts sufficient to constitute a cause of action against Defendant; therefore, Plaintiff's Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE
(General Denial)

1. Defendant denies each and every allegation of the Plaintiff's Complaint not specifically admitted, qualified, or explained.
2. Defendant admits that jurisdiction and venue are proper within this Court.
3. Defendant admits the allegations contained in paragraph five (5) insofar as they allege that Plaintiff worked at Defendant's business on February 18, 2011, but denies that Plaintiff was working at the direction of Defendant at the time of Plaintiff's alleged injury.
4. Defendant admits the allegations contained in paragraph eight (8).
5. Defendant denies all other allegations contained in Plaintiff's Complaint.

FOR A THIRD DEFENSE
(Absence of any Accident or Injury)

6. Defendant adopts and realleges each and every allegation set forth above as if fully repeated herein.
7. Defendant alleges that there was no accident nor any injury to Plaintiff at the time and place noted in Plaintiff's Complaint.
8. Defendant further alleges that Plaintiff intentionally caused the SUV to fall, then positioned himself near the SUV to make it appear that he might have been hit by the vehicle. Defendant then began calling for help.

FOR A FOURTH DEFENSE
(Acts of Others)

9. Defendant adopts and realleges each and every allegation set forth above as if fully repeated herein.
10. Defendant alleges that if any damages were sustained by Plaintiff, and the existence of such alleged damage is denied, said damage was proximately caused by the intervening and superseding intentional conduct or acts of negligence or wrongdoing of third persons over which Defendant had no control; therefore, Defendant is not liable, and Plaintiff's claims against this Defendant are barred.

FOR A FIFTH DEFENSE
(Comparative Negligence/Gross Negligence/Recklessness)

11. Defendant adopts and realleges each and every allegation set forth above as if fully repeated herein.
12. Even if Defendant was negligent in any respect, which is expressly denied, and such conduct operated as a proximate cause of Plaintiff's damage, if any, which is expressly

denied, Defendant alleges Plaintiff's negligence, grossly negligent, reckless, willful and wanton conduct contributed more than fifty percent (50%) to the cause of the incident, and therefore, Plaintiff's claims are barred as to this Defendant.

13. If it is determined that Plaintiff's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of Defendant, then the amount of recovery available to Plaintiff should be reduced by the percentage of Plaintiff's own negligence, carelessness, recklessness and gross negligence.

FOR A SIXTH DEFENSE
(Sole Negligence of Plaintiff)

14. Defendant adopts and realleges each and every allegation set forth above as if fully repeated herein.

15. Defendant alleges that any injury or damage sustained by the Plaintiff, and the existence thereof is expressly denied, was due to and caused by the negligence, carelessness, wantonness, willfulness and /or recklessness of Plaintiff, combining, concurring, and contributing with the negligence, carelessness, wantonness, willfulness and/or recklessness, if any, on the part of Defendant, without which negligence, carelessness, wantonness, willfulness, and /or recklessness on the part of Plaintiff, said alleged injury and damage would not have occurred or been sustained. For that reason, Defendant is not liable to Plaintiff in any sum whatsoever.

FOR A SEVENTH DEFENSE
(Failure to Mitigate Damages)

16. Defendant adopts and realleges each and every allegation set forth above as if fully repeated herein.

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17. The Plaintiff failed to mitigate his damages, thereby barring recovery.

FOR AN EIGHTH DEFENSE

(Open and Obvious)

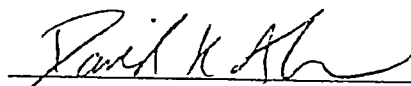
18. Defendant adopts and realleges each and every allegation set forth above as if fully repeated herein.

19. Defendant would show that if any defect or dangerous condition existed, which is expressly denied, such condition was open, obvious, and readily apparent to Plaintiff. Therefore, Defendant is not liable to Plaintiff whatsoever.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant prays that the Amended Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

WILLIAMS, HENDRIX, STEIGNER & BRINK, P.A.

By:



David K. Allen

Jonathan R. Hendrix

Attorneys for Defendant

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Lexington, South Carolina 29071

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Lexington, South Carolina

November 4, 2013

00016

James H. Corder - Direct Examination by Mr. Bunce

1 THE COURT: Yeah, I mean y'all can agree on it.

2 MR. HENDRIX: I'm sure it will come out in the
3 testimony any how.

4 MR. BUNCE: Right.

5 THE COURT: He was 46?

6 MR. BUNCE: He is 51, sir.

7 THE COURT: He is 51 now. Okay.

8 (The jury entered the courtroom at 1:27 p.m.)

9 THE COURT: All right. Good afternoon. We're
10 going to proceed with the case and the presentation of
11 evidence.

12 And you may call your first witness.

13 MR. BUNCE: The plaintiff calls James Harold
14 Corder.

15 JAMES HAROLD CORDER,
16 having been duly sworn, testified as follows:

17 THE CLERK: If you'd have a seat and state your
18 name for the record.

19 THE BAILIFF: Say your name?

20 THE WITNESS: My name is James H Corder.

21 DIRECT EXAMINATION

22 BY MR. BUNCE:

23 Q Mr. Corder, you own all the stock in Corder and
24 Sons, Incorporated; is that correct?

25 A You'll have to talk a little loud because I got an

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James H. Corder - Direct Examination by Mr. Bunce

- 1 ear problem.
- 2 Q All right. Mr. Corder, you own all the stock in
- 3 Corder and Sons, Incorporated; is that correct?
- 4 A Yeah.
- 5 Q All right. And you're the only corporate officer;
- 6 is that correct?
- 7 A Do what?
- 8 Q You're the only corporate officer; is that correct?
- 9 A Yeah. Right.
- 10 Q All right. And you're, when was your business
- 11 incorporated?
- 12 A When was what?
- 13 Q When was your business incorporated, sir?
- 14 A Corder and Sons.
- 15 Q Yes, sir. What year?
- 16 A '94.
- 17 Q All right. And before that, were you in the used
- 18 car business?
- 19 A Yeah, Corder Used Cars.
- 20 Q Okay. And sometime before you incorporated in
- 21 1994, you began running a salvage yard; is that correct?
- 22 A Yeah.
- 23 Q And that salvage yard is located over at 3626 Pond
- 24 Branch Road?
- 25 A Right.

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James H. Corder - Direct Examination by Mr. Bunce

- 1 Q -- in that area; is that correct?
- 2 All right. Now on those 12 acres, you have a bunch
- 3 of wrecked cars?
- 4 A Yeah.
- 5 Q And your business is to sell parts from those cars;
- 6 is that correct?
- 7 A Right.
- 8 Q And you buy wrecked cars from the auctions?
- 9 A Yeah.
- 10 Q And then you bring them back to here on your own
- 11 roll-back truck; is that right?
- 12 A Yeah.
- 13 Q And once they arrive back, you have your employees
- 14 take off the catalytic converters and batteries and tires;
- 15 is that right?
- 16 A Yes, and get the gas out of them.
- 17 Q Okay. And then you take the cars out onto the
- 18 yard; is that correct?
- 19 A Yeah.
- 20 Q All right. And what do you use to take them out on
- 21 the yard?
- 22 A This 924 Cat.
- 23 Q Okay. So that's a Caterpillar Loader? That's a
- 24 Caterpillar?
- 25 A Yeah.

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James H. Corder - Direct Examination by Mr. Bunce

- 1 Q And this Caterpillar, it has forks on it instead of
2 a bucket; is that right?
- 3 A It had a bucket when I bought it.
- 4 Q Okay. I'm going show you what's been marked as
5 Plaintiff's Exhibit 1. Is that the Caterpillar we're
6 talking about?
- 7 A Yeah.
- 8 Q Okay. Is this the Caterpillar here; is that
9 correct, sir?
- 10 A Yeah.
- 11 Q All right. Now when did you buy that Caterpillar?
- 12 A '97 or '98, I don't remember just which it was.
- 13 Q Okay. And when, when you bought it, it was a
14 regular front-end loader; is that right?
- 15 A It was a regular what?
- 16 Q Front-end loader?
- 17 A Yeah.
- 18 Q It had a bucket on it; is that correct? It had a
19 bucket on it?
- 20 A Yeah.
- 21 Q All right. And then you bought the forks that are
22 shown here from another company; is that right?
- 23 A I had them made.
- 24 Q Okay.
- 25 A Manufactured it.

00020

James H. Corder - Direct Examination by Mr. Bunce

1 Q You bought them from another company?

2 A Yeah.

3 Q All right. And you installed them yourself; is
4 that correct?

5 A All you had to do is put the pin in where the
6 bucket pinned.

7 Q Okay. But this -- this Caterpillar, it wasn't
8 designed as a forklift, was it?

9 A It wasn't originally, it had the bucket on it.

10 Q Before you bought the Caterpillar, you actually had
11 a regular forklift, correct?

12 A Yeah.

13 Q Okay. Now, let's talk about these work. A Cat --
14 this front-end loader here, it has two big arms, doesn't
15 it?

16 A Yeah.

17 Q And those actually raise and lower --

18 A With cylinders.

19 Q Yes. And those raise and lower the fork lift; is
20 that correct?

21 A Yeah, they raise and controlled inside the cab.

22 Q Yes, sir. And then it has in the center here, it
23 has another cylinder that controls the tilt of the forks;
24 is that correct?

25 A Yeah, the forks.

00021

James H. Corder - Direct Examination by Mr. Bunce

1 A Right.

2 Q Okay. But if you're going to pull a motor, you
3 bring the whole car or truck up by the garage; is that
4 correct?

5 A Right.

6 Q And so you would drive the Caterpillar out in the
7 yard, pick it up and bring it up by the garage?

8 A Yeah.

9 Q And when your employees needed to work under a car
10 or a truck, you would lift it up on the forks; is that
11 right?

12 A Yeah.

13 Q And they would stand there under the car or truck
14 while they worked; is that correct?

15 A Yeah, a 5-inch shaft stood up under it where it
16 couldn't drop.

17 Q Okay. But you depended on the hydraulics to hold
18 that -- that vehicle up in the air, didn't you?

19 A But it's never did.

20 Q Pardon?

21 A All these years, it's never dropped.

22 Q Okay. But the -- but you were depending on the
23 hydraulics to hold it that day?

24 A Well, it was just a safety device.

25 Q Okay. Well, what was the safety device, sir?

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James H. Corder - Direct Examination by Mr. Bunce

1 A Well, the axle out from under a house trailer with
2 a 5-inch-steel pipe.

3 Q I'm going show you what's been marked as
4 Plaintiff's Exhibit 16.

5 I'll give you a moment, sir, we'll get everybody on
6 the same page here.

7 All right. I'll tell you what, rather than messing
8 with that for a moment. May I see that photo? All right.
9 This is the -- this the axle you're talking about, sir?

10 A Yeah.

11 Q All right.

12 MR. BUNCE: May I publish this to the jury, Your
13 Honor?

14 THE COURT: You may.

15 BY MR. BUNCE:

16 Q This is the axle we're talking about.

17 Now what was, what was supposed to happen with the
18 axle, Mr. Corder?

19 A Underneath the fork.

20 Q Okay. It's supposed to go underneath the forks.
21 And that's -- that's from a mobile home; is that
22 correct?

23 A Yeah.

24 Q And so you'd have your employees stick one end of
25 it into a wheel on the ground?

00023

James H. Corder - Direct Examination by Mr. Bunce

- 1 the end of the tines?
- 2 A No.
- 3 Q We're talking about two feet here?
- 4 A From the pins on the tractor.
- 5 Q Okay. And -- and then the loader would actually
- 6 lower the forks onto that axle; is that correct?
- 7 A Do what?
- 8 Q Well, once they're holding up the axle, it's not
- 9 going to stand up by itself, is it?
- 10 A If you knew how --
- 11 Q Okay.
- 12 A -- to sit it in that wheel, it would sit by itself.
- 13 Q All right.
- 14 A But usually we put it under there.
- 15 Q All right. So one person --
- 16 A Lord, it's been there so long. Usually when we was
- 17 working.
- 18 Q Okay.
- 19 A Of course at that time, there wasn't nobody
- 20 supposed to been back there.
- 21 Q Right. So what I'm asking about is your procedure
- 22 for this. One employee would hold that in place and then
- 23 you would lower it onto the fork --
- 24 A Sit it on it, yeah.
- 25 Q Okay. Now, on the bottom side of those forks,

00024

James H. Corder - Direct Examination by Mr. Bunce

1 A Yeah.

2 Q And your son was not working there during the week,
3 correct?

4 A Right.

5 Q And you were running the Caterpillar; is that
6 correct?

7 A Not that day.

8 Q Okay. But you would, was it your procedure that
9 you always run the Caterpillar?

10 A Well, the other boy didn't drive it. The one
11 that's been there 27 years, he wouldn't drive no equipment.

12 Q Okay.

13 A So Bubby or myself always run it.

14 Q Okay. Now, you were talking about an employee that
15 had been there 27 years, right?

16 A Yeah.

17 Q That would be Mr. W.C. --

18 A And he's there now.

19 Q All right. Was he working for you in February of
20 2011?

21 A No, he had retired.

22 Q Okay. So in February of 2011, it was you and Mr.
23 Hogan, correct?

24 A Yeah.

25 Q Okay. And my question for you is that during that

00025

James H. Corder - Direct Examination by Mr. Bunce

1 time, you always ran the Caterpillar, isn't that right?

2 A We had what?

3 Q During that time February of 2011, you always ran
4 the Caterpillar; isn't that right?

5 A Not always. Sometimes he'd run it.

6 Q Okay. Getting ahead of ourselves, you had, you're
7 aware that Jerry generally knew how to run a loader?

8 A He'd been running it. He run it when he worked
9 there before.

10 Q Okay.

11 A He had worked there with Bubby before.

12 Q But anytime there was something being done with it
13 in February of 2011, it was you running it, wasn't it?

14 A Yeah, and him.

15 Q And him?

16 A And him.

17 (Mr. Bunce opened Mr. Corder's Original
18 Deposition.)

19 BY MR. BUNCE:

20 Q All right. Well, Mr. Corder, do you recall that we
21 took your deposition back on May 19th, 2014?

22 A May the 19th when?

23 Q 2014, we took testimony from you; do you recall
24 that?

25 A You --

00026

James H. Corder - Direct Examination by Mr. Bunce

- 1 Q You recall that?
- 2 A Yeah.
- 3 Q Okay. You were sitting in Mr. Hendrix office,
4 correct?
- 5 A Yeah.
- 6 Q Okay. And do you remember you were under oath that
7 day?
- 8 A Remember what?
- 9 Q Do you remember you were under oath that day?
- 10 A Yeah.
- 11 Q All right. And do you remember I asked you a
12 series of questions then? You remember me asking you
13 questions, sir?
- 14 A Yeah, I remember you asking questions.
- 15 Q I show you your page, page 57 there. We've been
16 talking about Jerry and who ran the Caterpillar, right?
- 17 A No, I don't, because he weren't supposed to be
18 there then.
- 19 Q Okay. All right. But we're talking about in 2011,
20 February, 2011, and I asked you a question about it, about
21 you showed him how to use that particular one and in
22 answering that, you said but anytime there was something to
23 be brought down or something, I always do it; is that
24 correct?
- 25 A Say what?

00027

James H. Corder - Direct Examination by Mr. Bunce

1 Q Is that correct, is that your testimony then, sir?

2 A What?

3 Q What I just told you?

4 A I don't remember.

5 Q Let's look at what the page says, sir. Looking at

6 the top of page 57, here, starting that first line, we're

7 talking about the loader here, right? Anytime there was

8 something to be brought down or something, I always do it;

9 is that your testimony, sir?

10 A If he asked me.

11 Q Okay. Was that your testimony?

12 A Well that day, he wasn't supposed to be there that

13 afternoon.

14 Q Okay. But was that your testimony then, sir?

15 A There weren't supposed to be nobody back there.

16 Q Was that your testimony in 2014, sir?

17 A I don't remember that.

18 Q Okay. Do you dispute that this is what you said

19 that day?

20 A Was I what?

21 Q Are you disputing that's what you said that day,

22 sir?

23 A No, I'm not.

24 Q But today you're saying today that sometimes it was

25 you and sometimes it was Mr. Hogan; it wasn't always you;

00028

James H. Corder - Direct Examination by Mr. Bunce

1 is that your testimony today, sir?

2 A I don't remember that.

3 Q Well, I'm asking you today, what is your testimony?
4 Is it that sometimes Mr. Hogan did it and sometimes you did
5 it?

6 A Hold it up.

7 Q No, drove the Caterpillar?

8 A I don't understand what you mean.

9 Q I'm asking you sitting here today, is it your
10 testimony that sometimes Mr. Hogan drove the Caterpillar
11 and sometimes you drove the Caterpillar?

12 A Right.

13 Q All right. Now, do you believe this system you set
14 up with the loader and axle was safe?

15 A Yeah, it was, you don't want to pick it up.

16 Q And you believe that because the axle was strong;
17 is that correct?

18 A No, I ran over it with that big tractor and you
19 can't bend it.

20 Q Okay. Actually you started using the axle as a
21 backup only after the hydraulic cylinder cracked on the
22 forklift that you used before the Caterpillar; isn't that
23 right?

24 A Yeah. You put it under that fork and you couldn't
25 let it down unless you moved the tilt.

00029

James H. Corder - Direct Examination by Mr. Bunce

- 1 Q Okay. And before that, you had folks working
2 underneath forks without any kind of backup; is that
3 correct?
- 4 A I had that axle for years. I don't know long they
5 used it before I went there to run it myself. The whole
6 time Bubby was there they used it.
- 7 Q Okay. But that axle only came into use after the
8 hydraulics broke on the forklift before, correct?
- 9 A No. Never broke no hydraulic.
- 10 Q On the forklift?
- 11 A Right on the --
- 12 Q Massey Ferguson Forklift?
- 13 A Well, it hadn't been run in 10 years.
- 14 Q All right. And that's what you had before the
15 Caterpillar, correct?
- 16 A Yeah, still got it.
- 17 Q And the cylinder cracked on that forklift, correct?
- 18 A No, it wasn't nothing but that axle; same thing.
- 19 Q Did the fork -- did the cylinder crack on the
20 forklift that you had before the Caterpillar?
- 21 A It had parts on it, yeah.
- 22 Q Did the cylinder crack?
- 23 A Yeah, the cylinder cracked on it.
- 24 Q Okay.
- 25 A But he wasn't working there.

00030

James H. Corder - Direct Examination by Mr. Bunce

1 Q All right. And before the cylinder cracked, you
2 didn't use that axle, did you?

3 A Yeah.

4 Q I'm sorry, yes?

5 A But it -- it wouldn't --

6 Q Did you use that axle before the cylinder cracked?

7 A Yeah, I always used it.

8 Q Do you remember when I -- when I asked the
9 questions at your deposition and I asked you if the axle;
10 so was that something that came in as soon as you got the
11 caterpillar and you told me that the forklift had
12 cracked --

13 A Now, I don't know how long they used it now. They
14 used it before I -- the boy went to work at the Caterpillar
15 place, the axle.

16 Q Okay. Well, didn't you tell me that that's, that
17 when it cracked, that's when they started using the axle?

18 A They've always used the axle.

19 Q I show you page 36 here of your deposition, sir.
20 All right. And I'm going show you starting at line 2 and I
21 started the question, When you were still -- and your
22 answer was because the forklift, when they, the cylinder
23 cracked on it and so they got this thing and started using
24 it; that was your testimony back in 2014, correct?

25 A Did what now?

00031

James H. Corder - Direct Examination by Mr. Bunce

1 Q All right. And you weren't working for Corder and
2 Sons during that period of time?

3 A No, not at the shop. My son ran it for 17 years
4 and he's been gone about approximately 10 I'd say because
5 he had been at the Caterpillar place.

6 Q Okay. But you knew --

7 A And I bought this big tractor before he left there.

8 Q Okay. But you knew your employees were using that
9 axle?

10 A They did.

11 Q And you knew that the forklift had cracked, the
12 cylinder?

13 A Yeah.

14 Q And you knew that at some point, the axle started
15 being used?

16 A Yeah.

17 Q Okay.

18 A They don't come with no locks on them.

19 Q I'm sure. And your belief that this, that the axle
20 caused it to be safe was based on the strength of the axle;
21 is that right?

22 A That's why I used it.

23 Q All right. Now prior to setting up your salvage
24 yard, you never took any courses on how to do that, did
25 you, on how to set up a salvage yard?

00032

James H. Corder - Direct Examination by Mr. Bunce

1 A Ain't nothing to it, just keep it level when you
2 pick it up. That's what two levers is on it for.

3 Q Okay. Well, I'm backing you up a little bit, sir.
4 Before you started running a salvage yard, did you look
5 into how you ought to run a salvage yard?

6 A I don't remember or I didn't work there until after
7 he left anyway.

8 Q Well, where did you -- where did you learn how to
9 run a salvage yard?

10 A My working for my foster dad.

11 Q Okay.

12 A When I was a kid.

13 Q All right. And he ran a salvage yard?

14 A I worked in the Model T days.

15 Q Okay.

16 A I believe I had enough experience.

17 Q Okay. And he ran a salvage yard?

18 A He didn't; I did, but he always did mechanical
19 work.

20 Q Okay.

21 A That's where I learned it at.

22 Q All right. When you decided you were going to open
23 a salvage yard, did you take any courses anywhere?

24 A All I did was just keep buying to fix up what I
25 sold.

00033

James H. Corder - Direct Examination by Mr. Bunce

1 Q Okay.

2 A And it ended up, I just got too big for that so I
3 just put in a salvage yard.

4 Q Right. Did you read any books on how you ought to
5 set up a salvage yard?

6 A No, I didn't need to. I had enough experience.

7 Q All right. And you never had a safety officer; is
8 that correct?

9 A No.

10 Q Okay.

11 A But I taught safety. I tried to do what I knowed
12 would hold to keep from getting hurt.

13 Q Okay.

14 A When that boys been there 27 years, he'd never been
15 hurt.

16 Q And you taught safety based on your own
17 experiences?

18 A What?

19 Q You taught safety based on your own experiences; is
20 that correct?

21 A Yeah.

22 Q Okay. You had any training? You didn't have any
23 training in rigging, did you?

24 A Well, when I was in service, I worked in the
25 garage.

00034

James H. Corder - Direct Examination by Mr. Bunce

1 Q Okay. And what type, what kind of garage
2 operations did you use?

3 A Automobiles, trucks, motorcycles.

4 Q Okay. And what years was that?

5 A 1945 in World War II.

6 Q Yes, sir. And then you set up your salvage yard in
7 about '94 or so?

8 A No. About '70 I imagine, somewhere's along in
9 there. Let's see, I was in, my wife died in '73 and I,
10 yeah, around '70. I was in it when she passed away in '73.

11 Q Okay. You haven't had any training in designing
12 safety apparatuses, have you?

13 A No, I had 70 something years training; 80 something
14 really.

15 Q That's through your own life experiences?

16 A Through what?

17 Q Through your own life experiences?

18 A Yeah.

19 Q Okay.

20 A Well, I had a foster dad to teach me.

21 Q Yes, sir. And you personally trained your
22 employees; is that right?

23 A Yeah.

24 Q All right. You didn't have a formal training
25 class, did you?

00035

James H. Corder - Direct Examination by Mr. Bunce

- 1 A I can't understand you.
- 2 Q Pardon?
- 3 A I didn't hear you. You don't --
- 4 Q All right. You didn't have a formal training
- 5 class, did you?
- 6 A Well, I got enough in service during the war.
- 7 Q Okay. But for your employees, when you hired an
- 8 employee, did you sit him down in a classroom and go over
- 9 some books and things?
- 10 A Well, most of it I already offered the equipment.
- 11 Q Okay. You didn't have any videos you showed them
- 12 on safety, did you?
- 13 A No. \
- 14 Q Now, Jerry Hogan worked for you, correct?
- 15 A Yeah.
- 16 Q All right. He actually worked for you two
- 17 different times, right?
- 18 A At what time?
- 19 Q He actually worked for you two different times; is
- 20 that right?
- 21 A Yeah, he worked for the boy the first time.
- 22 Q All right. And that's Robert?
- 23 A Yeah.
- 24 Q All right. And Jerry worked for the company for a
- 25 while in the early 2000's?

00036

James H. Corder - Direct Examination by Mr. Bunce

1 A You got me there. I just really don't know what
2 year he worked the first in.

3 Q Okay. And he left on his own; is that right?

4 A Right.

5 Q You didn't fire him?

6 A No, never fired a man.

7 Q Okay. And then in 2010, you hired him again; is
8 that right?

9 A Bubby did.

10 Q Okay. And that's your son?

11 A Or I guess it was '10. I don't know when it was.

12 Q Okay. Well it was a few months before -- before he
13 got hurt in February of 2011, right?

14 A I don't know that.

15 Q Okay. All right. He was a good employee, wasn't
16 he?

17 A He was what?

18 Q He was a good employee, right?

19 A Yeah.

20 Q Okay. And Jerry did what you told him to do?

21 A He did work where?

22 Q He did what you told him to do, correct?

23 A Yeah.

24 Q Okay. And you, you trained him --

25 A Now, a lot of it, he did on his own though, that I

00037

James H. Corder - Direct Examination by Mr. Bunce

- 1 didn't tell him to do.
- 2 Q All right. Your company trained him to do his job
- 3 the first time, right, the first time you hired him?
- 4 A Well, you'll have to ask Bubby; he worked for him.
- 5 I wasn't there.
- 6 Q All right. Well, did you conduct any training when
- 7 he -- he got hired the second time in 2010?
- 8 A No, I just did it to help him out. He was in
- 9 trouble needing the money.
- 10 Q All right. Did you give Jerry --
- 11 A He and Bubby dealt together then. I didn't do it.
- 12 Q Did you give Jerry Hogan any training in 2010 when
- 13 you rehired him?
- 14 A Well, the years he worked there he got training.
- 15 Q Okay. And that was through your company, correct?
- 16 A Yeah.
- 17 Q Okay. And Mr. Hogan, he pulled parts for you, yes?
- 18 A Yeah.
- 19 Q And you had some rental homes too, correct?
- 20 A Yeah.
- 21 Q All right.
- 22 A A little, not too much. Just little minor things.
- 23 Somebody would call and they'd have a problem and he'd help
- 24 out with it.
- 25 Q All right And Mr. Hogan --

00038

James H. Corder - Direct Examination by Mr. Bunce

1 A A water leak or something.

2 Q Sure, he did some maintenance work on those
3 rentals?

4 A It wasn't no job, he just did it on his own. I
5 paid him straight time.

6 Q Okay. So he did some maintenance work on your
7 rental homes too, correct?

8 A On what?

9 Q Mr. Hogan, he did maintenance work on your rental
10 homes, correct?

11 A A little problem like a water leak or something,
12 he'd go by because he worked with a man with pump before he
13 worked for me.

14 Q Okay. Now, Mr. Hogan, from the first time he
15 worked for you, he was familiar with your procedure for
16 using the front-end loader and the axle, correct?

17 A I guess so.

18 Q All right. Now getting on to February 18th. All
19 right. He was working for you that day? For Corder and
20 Sons?

21 A He wasn't supposed to be after noon when I paid
22 him.

23 Q Okay. Well let's get into that. So he was pulling
24 a motor that day, correct?

25 A I have idea. He told me that morning he came to

00039

James H. Corder - Direct Examination by Mr. Bunce

1 work that he wanted to paid by dinner, that he had to go
2 pull out a motor for a man and so I thought he was gone. I
3 didn't even know he was on the property.

4 Q You didn't know he was on the property that day?

5 A No, he was supposed to have went home to pull out a
6 motor for a man he told me and I paid him like he said at
7 dinner time.

8 Q All right. So you believed that he was gone?

9 A Certainly.

10 Q And the first time, when was the first time you,
11 you knew he hadn't left?

12 A When he made the noise.

13 Q Made what noise, sir?

14 A When he hollered.

15 Q Okay. All right. Do you recall what he did that
16 morning?

17 A Yeah.

18 Q What did he do that morning?

19 A We were there working that morning and when noon
20 time came, I gave him his check like he wanted.

21 Q Okay. Well, was that an unusual thing for you to
22 pay your employees at noon?

23 A Yeah.

24 Q That was unusual?

25 A I paid them usually on Friday evenings.

00040

James H. Corder - Direct Examination by Mr. Bunce

- 1 Q So it was unusual --
- 2 A Yeah.
- 3 Q -- to give him pay at noon?
- 4 A I did it because he asked me to.
- 5 Q All right. Had he told you that there was a motor
- 6 there that had been sold --
- 7 A No.
- 8 Q -- for your business?
- 9 A He had mentioned a motor to me. The only thing he
- 10 said he had to go pull out a motor for a man.
- 11 Q All right. Did you hear the loader running that
- 12 day?
- 13 A No, I didn't.
- 14 Q All right. Now, shortly before you heard him
- 15 yelling, was there anyone there?
- 16 A Do what?
- 17 Q Was there anyone there in your -- on your premises
- 18 shortly before you heard him yelling?
- 19 A I was sitting in the shed there about 30 foot from
- 20 where he was.
- 21 Q Okay. Did you have any customers there?
- 22 A Two ladies.
- 23 Q Okay. And that's Natasha Renee Smith and her
- 24 mother; is that correct?
- 25 A Yeah.

00041

1 Q All right. And Renee was actually your tenant; is
2 that right?

3 A They was actually what?

4 Q She was your tenant; she rented a home from you,
5 correct?

6 A No, they didn't rent; they just lived in one.

7 Q It was your home, Corder and Sons?

8 A Yeah, it was a mobile home.

9 Q Okay. And she was living there?

10 A Yeah.

11 Q Okay. And she was there that day to make payments
12 on a car?

13 A Well, that's what, I thought she was; she didn't
14 make one after all the excitement, but her and her mother
15 was there and she was making payments on the car.

16 Q Okay. You're saying that the first time that you
17 knew Mr. Hogan was there was when you heard him hollering
18 for help?

19 A Yeah.

20 MR. BUNCE: Will you give me a moment, Your Honor?

21 THE COURT: Sure.

22 BY MR. BUNCE:

23 Q Mr. Corder, are you having a hard time remembering
24 what happened that day?

25 A Well, I'm no baby.

James H. Corder - Direct Examination by Mr. Bunce

1 other worker?

2 A No.

3 Q You don't remember that?

4 A No, I didn't see it come down.

5 Q Okay. And --

6 A Didn't hear it either.

7 Q -- all right. I asked you, Well, you heard the
8 loader and what's the next thing you knew; do you recall,
9 you told me that you went out and saw Mr. Hogan?

10 A Yeah.

11 Q All right.

12 A When he hollered; that's the first time I knew he
13 was out there.

14 Q Okay. All right. I want you to look at line 11 on
15 page 64 there, sir.

16 Mr. Corder, I want you to look at line 11 on page
17 64 there?

18 A On what?

19 Q Line 11. Okay. It came down. Well you heard the
20 loader and what's the next thing you knew? The answer,
21 this was you talking, Well I walked out there one time and
22 he was piddling around there. I didn't see him doing
23 nothing; he was just piddling around and I went back in
24 there where the ladies was. Do you remember giving that
25 testimony, sir?

00043

James H. Corder - Direct Examination by Mr. Bunce

- 1 A I didn't say that.
- 2 Q All right?
- 3 A I didn't say nothing about he was piddling around.
- 4 I never saw him after that.
- 5 Q All right. And you don't remember the SUV being
- 6 there by Mr. Hogan?
- 7 A Who?
- 8 Q You don't remember the SUV being out there behind,
- 9 behind your garage when you went out to check on Mr. Hogan;
- 10 you don't remember that?
- 11 A Yeah, I went out. Me and the lady went out there.
- 12 Q Okay. But before he got injured, you remember the
- 13 SUV being there?
- 14 A I didn't go out there. I didn't know he was back
- 15 there.
- 16 Q Okay. You remember me asking you was the SUV
- 17 there?
- 18 A No, I think they a lot in here nobody else won't
- 19 remember. I don't remember you asking me nothing like
- 20 that. It's always been that. I didn't know he was there.
- 21 Q Mr. Corder, you had given testimony back on May
- 22 19th, 2014. Do you believe your memory in 2014 was more
- 23 accurate than today?
- 24 A Was I accurate?
- 25 Q Was your memory in May of 2014 more accurate than

00044

James H. Corder - Direct Examination by Mr. Bunce

1 A On the loader.

2 Q All right.

3 A Resting against the forks of the motor.

4 Q I'm going to show you Plaintiff's Exhibit 10, sir.

5 All right. So that's what we're looking at, this picture
6 up here, sir?

7 A This picture wasn't made then.

8 Q Okay. But I'm going to ask you a series of
9 questions --

10 A This car was laying up on the forks and the forks
11 was not on the ground.

12 Q Okay.

13 A It was laying up on its side; it wasn't on the
14 wheels.

15 Q All right then. Now is this the SUV?

16 A That's not it. That's the car and the tractor, but
17 it wasn't in that position.

18 Q Okay. All right then. So it looked a little bit
19 different out there; it looked different out there when you
20 went out there, correct? It looked a little, it looked
21 different than this picture, correct?

22 A Yeah.

23 Q All right.

24 A Altogether different from that.

25 Q All right.

00045

James H. Corder - Direct Examination by Mr. Bunce

1 A The forks was still under the car and it was laying
2 on its side.

3 Q All right. Now I'm going to -- I'm going to tell
4 you that your attorney sent me this picture. Okay. Now,
5 do you know where this picture came from?

6 A I don't know where this one came from.

7 Q Okay. All right. But that is the SUV that was out
8 there that day, correct?

9 A Yeah.

10 Q All right. And you know what year SUV that is?
11 That's a Suburban. Correct?

12 A Yeah.

13 Q And is that a '97 Suburban, sir?

14 A I don't know just what year it was.

15 Q Now, how was the scene that you saw out there
16 different from this picture, sir?

17 A What?

18 Q How was the scene that you saw out there different
19 from this picture?

20 A Much different than this.

21 Q Okay. Tell me how, sir?

22 A Well, it was still on the forks, leaning on the
23 forks and they were not on the ground and it was up about
24 four foot high and the forks tilted just enough for it to
25 slide down on its side.

00046

James H. Corder - Direct Examination by Mr. Bunce

1 Q Okay. The SUV was on its side?

2 A Yeah.

3 Q All right. The SUV was laying on its side on the
4 ground?

5 A Yeah, on the driver's side laying on the forks
6 underneath part of this track. The truck was on the forks;
7 it wasn't off like that.

8 Q So the forks were tilted; is that correct?

9 A Yeah.

10 Q But the forks were higher off the ground and not
11 tilted at as much of an angle?

12 A Back here in the pen they were about four foot and
13 we always picked it up six foot to put the axle under it
14 and it was down, let down about two foot and then it tilted
15 until that car slid down off the forks.

16 Q Okay. And when you came out there after you heard
17 him calling for help, Mr. Hogan was out there by that SUV;
18 is that correct?

19 A No, he was back towards the wheel of the tractor
20 laying on the ground facing the SUV.

21 Q Okay. And that's the point when you tried to pick
22 him up?

23 A Yeah.

24 Q All right. Did he say anything to you?

25 A We didn't do anything. She couldn't pick up her

00047

James H. Corder - Direct Examination by Mr. Bunce

- 1 A That's the first time I ever remember him wanting
2 to get paid at noon.
- 3 Q Okay. What about your other employees; you didn't
4 pay them around noon?
- 5 A There wasn't nobody else there that day.
- 6 Q All right.
- 7 A But I always paid off on Friday afternoons, no
8 certain time, but it would always be in the evening.
- 9 Q All right. Do you remember when I asked you was it
10 normal -- we were talking about Mr. Hogan. And I asked you
11 was it normal for you to pay him at noon time.
- 12 A No.
- 13 Q All right. Reading page 62 there, line 5, I want
14 you to read along with me, Mr. Corder, can you do that?
- 15 A What's that?
- 16 Q Can you read along on page 62 there, sir?
- 17 A Which one?
- 18 Q Page 62, line 5 and I asked you was it normal for
19 you to pay him at noon time and you answered yeah, I paid
20 them --
- 21 A Well, I didn't understand your question then.
- 22 Q And your answer was, I paid them, a lot of them on
23 Friday so they could go get it cashed, you know. Was that
24 your answer back in 1994, sir?
- 25 A Yeah, I paid them, a lot of them in Fridays so they

00048

James H. Corder - Direct Examination by Mr. Bunce

1 Q Okay.

2 A And no tools there so he couldn't have been working
3 on it.

4 Q Okay. Well, let's, can we agree that if you had
5 that built that the SUV wouldn't have slid off -- off the
6 forks?

7 A Possibly not. It wouldn't have fell off no way if
8 somebody hadn't let them down.

9 Q If it was on the stand, correct? It wouldn't have
10 slid off if it was on a stand?

11 A Whoever was back there; somebody let them down.
12 The axle didn't fall out from under there.

13 MR. BUNCE: That's all the questions I have at this
14 time, Your Honor.

15 THE COURT: Mr. Hendrix.

16 MR. HENDRIX: Your Honor, for the record and to
17 make it more complete, I would like to publish a part of
18 Mr. James Harold Corder's deposition from page 56, lines 8
19 through 12.

20 THE COURT: Go ahead.

21 MR. HENDRIX: Question: Now was Jerry, was he
22 allowed to use the Caterpillar?

23 Answer: Yeah, he run it some; very little. One of
24 us usually run it, like Mr. Porter.

25 ///

00049

James H. Corder - Cross-Examination by Mr. Hendrix

CROSS-EXAMINATION

BY MR. HENDRIX:

Q We're doing this a little unusually since Mr. Bunce has called you first. I haven't had a chance to ask you questions and let you sort of introduce yourself to the jury. So that's what I want to do now if it's okay with, Your Honor.

How old are you?

A 89.

Q When's your birthday?

A Last of December.

Q And I believe you've already indicated that in your lifetime you served in military service during World War II?

A Talk a little louder, Mr. Hendrix.

Q I'm sorry.

MR. HENDRIX: In fact, Your Honor, can I move this a little closer?

THE COURT: Sure.

(The podium was moved closer to the witness stand.)

BY MR. HENDRIX:

Q I think maybe most people are having an okay time hearing me.

A Most people are not 89.

Q That's true. And I -- I've got in hearing aids

00050

James H. Corder - Cross-Examination by Mr. Hendrix

1 right now and I'm wondering what is going to happen in the
2 future with me too.

3 What branch of the service did you serve in?

4 A Navy.

5 Q And how long were you in there?

6 A Two years.

7 Q When did you get out?

8 A When the war was declared over.

9 Q Okay. How long have you lived in Lexington County?

10 A 89 years.

11 Q Okay. And a couple of weeks?

12 A And a couple of weeks.

13 Q Where did you go to school?

14 A I went to country school through the seventh grade,
15 Poplar Springs near where I live and then I went to Gilbert
16 High.

17 Q You graduated from Gilbert High?

18 A Yeah.

19 Q How old were you when you went into the Navy?

20 A I lacked one month even being 18.

21 Q Okay. When you got out of the service, I think
22 you've already told the jury that during the time in the
23 Navy, you worked on -- did mechanic work as part of your
24 service; is that correct?

25 A Right.

00051

James H. Corder - Cross-Examination by Mr. Hendrix

- 1 Q When you got out, what kind of work did you do?
- 2 A Same thing.
- 3 Q And when did you start -- I believe you sort of got
- 4 into fixing up cars in the used car business; is that
- 5 right?
- 6 A Yeah.
- 7 Q When did that happen?
- 8 A In '46, I got out in May of '46.
- 9 Q Okay. And I think you said you continued that on
- 10 up until the time that you got or accumulated enough cars
- 11 that you kind of by default got into the salvage business?
- 12 A Yeah.
- 13 Q Is that right? Is that right?
- 14 A Yeah.
- 15 Q Okay.
- 16 A Me and the oldest boy. He was wanting to come home
- 17 and go to work. He worked in Columbia at City Garage.
- 18 Q Okay. And is your oldest boy, Robert, and he's
- 19 also known as Bubba or Bubby?
- 20 A Yeah.
- 21 Q When he came home and starting doing that, what did
- 22 you do after that?
- 23 A I went to work in rental houses.
- 24 Q Okay.
- 25 A I went in the house and land business.

00052

James H. Corder - Cross-Examination by Mr. Hendrix

1 Q Okay. And your son, Robert or Bubby, he ran --

2 A Ran the business.

3 Q -- the salvage business?

4 A Yeah.

5 Q And he ran that for something like I believe you
6 said 17 years?

7 A 17 years.

8 Q And during the first time that Mr. Hogan would have
9 worked there, did he work there with Bubba?

10 A Yeah.

11 Q And was he initially trained by Bubba?

12 A Yeah.

13 Q And when he came back there to work the second
14 time, Bubba had already gone to work for the Caterpillar
15 people. What's the name of the place he works?

16 A Blanchard's.

17 Q Blanchard. And so you would be there some during
18 the week then; is that correct?

19 A Yeah.

20 Q Now, did Mr. Hogan anytime around February the 18th
21 of 2011, which I believe is the date of this accident,
22 anywhere around there, did he ever ask you what the price
23 of an engine was going to be? Ask you, not anybody else.

24 A Not that I remember.

25 Q Okay.

00053

James H. Corder - Cross-Examination by Mr. Hendrix

- 1 A Usually he was around there when I was talking to
2 people, you know, over the telephone.
- 3 Q Okay.
- 4 A He could possibly hear me tell them.
- 5 Q Did you or your son -- well those -- you and your
6 son, Bubba, the ones that were to quote the prices on the
7 engines?
- 8 A Yeah, we usually give what each other asked.
- 9 Q Okay. On the day all of this -- whatever happened,
10 did you bring an SUV down from the field?
- 11 A No.
- 12 Q Not at all?
- 13 A No.
- 14 Q Who was the only person there that was there to
15 bring it down with the loader?
- 16 A Just those two ladies.
- 17 Q And was Mr. Hogan there?
- 18 A Yeah. Yeah.
- 19 Q The two ladies didn't operate that loader, did
20 they?
- 21 A No, they were sitting there in the shed with me.
- 22 Q Okay. So you didn't bring the SUV down or help him
23 bring it down?
- 24 A No.
- 25 Q And I believe it was a Suburban; is that correct?

00054

James H. Corder - Cross-Examination by Mr. Hendrix

1 A That's right.

2 Q And you didn't help him set one up either, did you?

3 A No.

4 Q Had you told him to do that?

5 A No, for he told me he was going to do it for
6 another man. He didn't tell me he was going do it at my
7 property.

8 Q Whatever he intended, you understood that he was to
9 leave, that you thought he was going off your place --

10 A Correct.

11 Q -- and help somebody else remove an engine?

12 A That's what he said.

13 Q Now, after this, after he hollered and y'all went
14 out there and saw him and everybody came and everything
15 else, had the, before that moment, had there been any
16 problems with the forks or the lifting device on that
17 Caterpillar loader?

18 A Never. It was a good machine; anybody need a good
19 equipment, Caterpillar.

20 Q Now since then, since then -- I mean I'm talking
21 about from anytime that it would have been used after Mr.
22 Hogan left in the ambulance -- has it given you any
23 problems with the forks or the lift? The lifting arms,
24 these --

25 MR. HENDRIX: Excuse me, Your Honor. And I don't

00055

1 know how to use that and I can't see it anyhow.

2 BY MR. HENDRIX:

3 Q This is Plaintiff's Exhibit 9. I'm going to call
4 it these yellow lifting arms. Now, I don't know what the
5 correct term is, but you see what I'm talking about?

6 A Yeah.

7 Q And the forks are on the end of it; is that
8 correct?

9 A Yeah.

10 Q And these lifting arms lift it up and the forks,
11 you can tilt them --

12 A Yeah.

13 Q -- some either way. Has either one of them
14 given -- given any problems since the time that Mr. Hogan
15 left in the ambulance?

16 A Nor before.

17 Q Neither one?

18 A No.

19 Q Okay. Now, I'm not sure if this is the exact
20 picture he was using; I can't remember the exhibit number
21 that he gave, but it's your belief that these pictures were
22 not taken the day of the accident, but later; is that
23 correct?

24 A Yeah.

25 Q Now, let me ask you this, back when this happened,

00056

James H. Corder - Cross-Examination by Mr. Hendrix

1 your son, oldest son, Bubba or Robert, was not working
2 there during the week?

3 A No.

4 Q He was working at Blanchard?

5 A Yeah, right.

6 Q But on the weekend, on Saturday, he would come and
7 work there?

8 A Yeah.

9 Q Do you know of your own knowledge whether or not
10 the Saturday following this event on February the 18th,
11 2011, I believe that was a Friday?

12 A Yeah.

13 Q That on the very next day, do you know of your own
14 knowledge whether or not Bubba used this loader to move
15 something?

16 A I would think so.

17 Q Okay. So you're pretty sure that it was used and
18 not left in this position after the Saturday came?

19 A That morning when he came.

20 Q Right. I think you've already covered that nobody
21 ever came to buy the engine out of the SUV?

22 A No, never called.

23 Q Is it true that Ms. Smith, Natasha Renee Smith, and
24 her mother -- I believe her mother's name is Becky -- came
25 to the shop right about the time or maybe just after you

00057,

1 had given Mr. Hogan his check, somewhere in there?

2 A Yeah, it was at noontime; I wouldn't say the exact
3 time.

4 Q Right.

5 MR. HENDRIX: Begging the Court's indulgence?

6 THE COURT: Yes, sir.

7 (There was a brief pause.)

8 BY MR. HENDRIX:

9 Q Is it true, Mr. Corder, that usually when a car was
10 going to be lifted up to be worked on underneath and the,
11 the mobile home axle was put up underneath the fork of the
12 loader, that usually that was a two-person job?

13 A Usually.

14 Q One person inside operating the controls on the
15 loader and one person out there holding it and making sure
16 it's straight up?

17 A Yeah, but you could do it by yourself.

18 Q Right, but it was hard?

19 A It wasn't easy.

20 Q And so usually if somebody was around --

21 A Yeah.

22 Q -- you used two people?

23 A Yeah.

24 Q But you didn't help Mr. Hogan set this up?

25 A No.

James H. Corder - Cross-Examination by Mr. Hendrix

- 1 Q At all?
- 2 A No.
- 3 Q Now, let's talk about this. Was that loader fully
- 4 capable of holding that SUV up; was the Caterpillar loader
- 5 strong enough to hold up the SUV?
- 6 A Two of them.
- 7 Q It could hold two of them?
- 8 A Yeah, for I've hauled two at the time and stacked
- 9 one on the other one.
- 10 Q So that wasn't, the load wasn't the problem?
- 11 A No.
- 12 Q All right. Did you ever see any evidence of any
- 13 kind of failure or breakdown of the loader after this with
- 14 Mr. --
- 15 A The only thing, the battery.
- 16 Q Okay. But not that day?
- 17 A No, I put batteries in it.
- 18 Q All right. But I'm saying have you seen any
- 19 evidence --
- 20 A No --
- 21 Q -- was there any evidence out there that this
- 22 machine had broken down that caused the forks to tilt?
- 23 A Nothing has ever been done to it.
- 24 Q So right afterwards, when you went to use this, the
- 25 forks worked just fine?

00059

1 A Yeah.

2 Q The lifting arms as I call them, I'm sure there's
3 another name for them --

4 A Worked good yesterday.

5 Q Worked good yesterday, and it worked good right
6 afterwards?

7 A Yeah.

8 Q And those have not been repaired even since 2011?

9 A Nothing's ever been done to it.

10 Q Now, do you know whether or not --

11 MR. HENDRIX: Your Honor, I'm referring to
12 Plaintiff's Exhibit Number 9.

13 BY MR. HENDRIX:

14 Q In the position that this is in, that is the
15 lifting arms, as I call them, are raised and the forks
16 tilted. Do you know of any way to get it to do that other
17 than use the levers and make the forks tilt down? Is that
18 the only way you know of?

19 A That's the only way is to use the controls.

20 Q Okay. That's not an accidental thing; that's not
21 the way it would happen if something accidentally happened?

22 A So far; so good.

23 Q Right. It hasn't happened yet with that?

24 A No.

25 Q Okay.

00060

James H. Corder - Redirect Examination by Mr. Bunce

1 MR. HENDRIX: Your Honor, I don't believe I have
2 any further questions at this time.

3 THE COURT: Redirect?

4 MR. BUNCE: Yes, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. BUNCE:

7 Q Mr. Corder, Robert, your son, he was your employee
8 when he trained Mr. Hogan the first time, correct?

9 A What?

10 Q Bubba, he was your employee, correct? He was
11 Corder and Sons employee --

12 A Yes, sir.

13 Q -- at the time he was training Mr. Hogan the first
14 time, correct?

15 A Yeah.

16 Q Okay. Now, I want to be sure I'm absolutely
17 correct and understand your position here. You're saying,
18 your position is that what's in that transcript is not what
19 you said that day in 2014; is that right?

20 MR. HENDRIX: Objection, improper redirect.

21 THE WITNESS: No, it don't read that way.

22 THE COURT: Overrule.

23 THE WITNESS: Somebody added something to it.

24 MR. BUNCE: All right. That's all the questions I
25 have?

00061

1 having trouble seeing that.

2 THE COURT: Sure. Right.

3 MR. HENDRIX: It's not the projector's fault. I

4 think it's just the lighting, it being the light's fault.

5 THE COURT: Okay. Well, let's take about 5 minutes

6 and crank back up.

7 Thank you. I appreciate it.

8 (A brief recess was observed.)

9 THE COURT: All right. We ready for the jury?

10 MR. BUNCE: One moment, Your Honor. My client's in

11 the restroom.

12 THE COURT: Okay. It would be hard to start

13 without him.

14 (Mr. Hogan entered the courtroom.)

15 THE COURT: Okay. Bring the jury in.

16 (The jury entered the courtroom at 3:08 p.m.)

17 THE COURT: All right. Yes, sir, you may call your

18 next witness.

19 MR. BUNCE: If it please the Court, I call Jerry

20 Hogan.

21 THE CLERK: Raise your right and place your left on

22 the Bible?

23 JERRY HOGAN,

24 having been duly sworn, testified as follows:

25 THE CLERK: Have a seat and state your full name

00062

Jerry Hogan - Direct Examination by Mr. Bunce

1 for the record, please?

2 THE WITNESS: My name is Jerry Garland Hogan.

3 DIRECT EXAMINATION

4 BY MR. BUNCE:

5 Q All right. Mr. Hogan, where did you grow up, sir?

6 A I raised out in Roanoke, Virginia, but I live in
7 Leesville.

8 Q Okay. And where did you go to school?

9 A Gilbert High School.

10 Q And did you graduate there, sir?

11 A Yes, sir.

12 Q Okay. And are you married?

13 A Yes, sir.

14 Q All right. How long you been married?

15 A The 14th of this month will be 10 years.

16 Q Okay. And who's your wife?

17 A Melinda Hogan.

18 Q All right. Is she seated here in the courtroom?

19 A Yes, sir.

20 Q Okay. And do you have any children?

21 A Yes, sir.

22 Q All right. Who are your children?

23 A I got one named Christian Elliott found out he was
24 my biological son; and I got a daughter 8 years old and I
25 got one 5.

00063

Jerry Hogan - Direct Examination by Mr. Bunce

- 1 Q All right. Did you do them in a -- did you work
2 from a crane? Or how did you do that?
- 3 A Worked from a bucket truck or a crane.
- 4 Q Okay. All right. And you said you worked for
5 Corder and Sons?
- 6 A Yes, sir.
- 7 Q How many times did you work for them?
- 8 A Two. Twice.
- 9 Q Okay. Now the first time, when did you start for
10 them?
- 11 A Around the summertime.
- 12 Q Okay. Do you remember what year it was?
- 13 A No, I do not.
- 14 Q Okay. About how many years ago was it?
- 15 A Probably been about 8 years ago.
- 16 Q Okay. How long did you work for them that first
17 time?
- 18 A A year.
- 19 Q Okay. And why did you stop working for them?
- 20 A The weather.
- 21 Q What do you mean?
- 22 A Sometimes it'd be raining and cold.
- 23 Q All right. Did you work for anyone else in between
24 times you worked at Corder?
- 25 A I worked at Mid-state Auto Auction.

00064

Jerry Hogan - Direct Examination by Mr. Bunce

1 Q Okay. All right. And then the second time you
2 worked for them when did you start?

3 A Around August.

4 Q Okay. And how did you get the job that second
5 time?

6 A Bubba kept on coming to my house asking why I went
7 home.

8 Q Okay. All right. And when you started back at
9 Corder and Sons, what did you do for them?

10 A Pull motors or transmissions.

11 Q Okay. And how much were you paid, sir?

12 A Like \$6 an hour.

13 Q All right. And what, what hours did you normally
14 work?

15 A I worked from 8:30 sometimes it was 6 o'clock.

16 Q Okay. What days did you work?

17 A Monday through Friday; on Wednesdays I worked half
18 a day and I worked at Mid-state Auto Auction driving cars
19 in the auction block.

20 Q Okay. So you worked at Mid-state Auto Auction too?

21 A Yes.

22 Q All right. All right. Now that second time, who
23 else worked there with you?

24 A Just me and Harold.

25 Q And what did Mr. Corder do?

00065

Jerry Hogan - Direct Examination by Mr. Bunce

- 1 A He ran the front-end loader like if I needed a
2 motor or transmission, he'd bring it down to me.
- 3 Q Okay. And we heard testimony that he's 89. Was he
4 out there pulling parts?
- 5 A No, sir.
- 6 Q That was you?
- 7 A Yes, sir.
- 8 Q How many times did you pull engines when you worked
9 for Corder and Sons?
- 10 A Basically I pulled about three.
- 11 Q All right. And what was the procedure for pulling
12 an engine in general?
- 13 A A guy buys a motor and, you know, he'll want to
14 hear it run. I crank it up and he says I want that motor
15 and he says how much you want for it and I tell him
16 different prices.
- 17 Q Okay. And if he wanted to buy it, what did you do?
- 18 A I get a deposit on the motor and then I pull it.
- 19 Q Okay. What was the procedure for pulling the
20 motor?
- 21 A Somebody might have a bum motor in their car.
- 22 Q Okay. How did you go about pulling the motor there
23 at Corder and Sons?
- 24 A I work underneath -- gut top end with sockets and
25 ratchets and break the bolts loose. Then raise the bottom

00066

Jerry Hogan - Direct Examination by Mr. Bunce

1 end, crank it up, raise that up, put the mobile home axle
2 up underneath it to hold it up and I get up underneath.

3 Q Okay. So is this something you did out in the
4 yard?

5 A Yes.

6 Q And did you do it out where all the cars are
7 stacked out there?

8 A No, behind the house.

9 Q So you brought it in by the garage?

10 A Yes, sir.

11 Q Okay. And -- and you said something about the top
12 end; what do you mean by the top end?

13 A Getting the bolts out, taking the gas line and
14 linkage --

15 Q All right. And --

16 A -- and wiring harness.

17 Q -- the top part of the motor, the engine?

18 A Yeah.

19 Q Okay. And then the bottom part, what do you mean
20 by that?

21 A The rest of the exhaust, torque converter bolts,
22 and the rest of the valves and bolts.

23 Q Okay. All right. Now, long did it normally take
24 to do the top part of the motor?

25 A I can do one in approximately about 30 to 40

00067

1 minutes.

2 Q Okay. And then the bottom?

3 A It depends on how rusty the bolts are. Sometimes
4 it'll take about an hour because you have to -- I didn't
5 want to break the studs off in the manifolds.

6 Q Okay. All right. Now, this process that you use
7 there, who taught you that?

8 A I learned it on my own. And plus I went to Job
9 Corp to try to get my high school diploma or GED and I
10 didn't get it so I got some -- I got like a diploma in auto
11 mechanics.

12 Q Okay. All right. Now the part, you said there was
13 a part about raising the vehicle up?

14 A Yeah.

15 Q All right. Who taught you that part?

16 A I worked with S & D Grading, run heavy equipment.

17 Q Okay. Well, I'm talking about when you worked at
18 Corder and Sons?

19 A Right.

20 Q All right. And you said that you had to raise up
21 the --

22 A The vehicle with the forklift.

23 Q Okay. You use a forklift. All right. And you
24 said something about an axle there?

25 A Yeah.

00068

Jerry Hogan - Direct Examination by Mr. Bunce

- 1 Q Right. Where did you learn about the axle?
- 2 A Bubba they told me I need the support to help
- 3 stabilize the weight.
- 4 Q Okay. That was something that they taught you?
- 5 A Yes.
- 6 Q They, being Corder and Sons?
- 7 A Yes.
- 8 Q Was any of that your idea?
- 9 A No.
- 10 Q Did you have any concerns about it?
- 11 A I was at issue that somebody was going to get hurt.
- 12 Q Okay. Did you say anything to Mr. Corder about
- 13 that?
- 14 A Yes, I said we need to build something safer before
- 15 someone gets hurt.
- 16 Q All right. And what did he say about that?
- 17 A He didn't say much of anything.
- 18 Q Okay. Did the axle seem strong to you?
- 19 A Yeah.
- 20 Q All right. Now, did you operate the loader there
- 21 at Corder and Sons?
- 22 A No, sir.
- 23 Q Okay.
- 24 A I'd crank it up and let it warm up or if I'm
- 25 finishing pulling out from underneath -- I'd crank it up

Jerry Hogan - Direct Examination by Mr. Bunce

1 and let it down.

2 Q Okay.

3 A I did operate it up in the field or nothing.

4 Q Okay. Do you remember when your -- when your
5 injury occurred?

6 A November the 18th, 2011.

7 Q Okay. What day of the week was this?

8 A It was on Friday.

9 Q And how did you get there that day?

10 A I drove -- I had a '95 Bonneville. I drove it to
11 work and when I -- February 18th that year, that's when I
12 broke my back and the ambulance came and got me. Renee and
13 her mama called the ambulance on me.

14 Q Okay. The Bonneville that you drove that day,
15 that's -- that's an automobile?

16 A Yes, sir.

17 Q All right. Is that two or four doors?

18 A It was four door.

19 Q Okay. But it's not a pickup truck?

20 A No, sir.

21 Q All right. You had a pickup truck?

22 A Yes, sir.

23 Q Okay. What kind of pickup truck did you have?

24 A I had two of them.

25 Q Okay. What kind did you have?

00070

1 A I had a 81 and a half with 3-speed on the column.
2 Q Excuse me, 81 and a half what?
3 A Pickup.
4 Q What manufacturer?
5 A Chevrolet.
6 Q Okay. All right. What was the other one?
7 A A Z71.
8 Q Okay. Who makes that one?
9 A Chevrolet.
10 Q All right. What year was that one?
11 A '91.
12 Q All right. When you got there that Friday, what
13 were you going to do?
14 A I was waiting until I get a call to see if anybody
15 needed any parts.
16 Q Okay. And at some point, did you -- something come
17 up with a motor?
18 A Like I say, someone called me for a motor, I give
19 him a price and then I asked him does he want it and he
20 says yes, so I pulled it.
21 Q Okay. Did you sell the motor that Friday?
22 A Yes. Yes, I did.
23 Q Okay. What was --
24 A The boy came at two o'clock -- no, it was at noon.
25 I didn't finish getting it out.

00071

Jerry Hogan - Direct Examination by Mr. Bunce

1 Q Okay.

2 A About 2:30 I was on my way to the hospital.

3 Q All right. So what time did you start pulling the
4 motor that day?

5 A Right after lunch and that was at 12.

6 Q All right. And this was a motor for a customer of
7 Corder and Sons?

8 A Yes, sir.

9 Q All right. Do you know about what time you
10 finished with the top half of the engine?

11 A I was finished with the top end about one o'clock.

12 Q Okay. And what did you do when you finished the
13 top end?

14 A Told Mr. Harold I needed to do the bottom, the
15 bottom end.

16 Q Okay. And what did he do?

17 A He cranked it up and raised it up for me and I put
18 that axle, mobile home axle up underneath it.

19 Q Okay. Did you -- the way you put it there that
20 day, was it any different than any other day?

21 A No.

22 Q Did you do it the way you'd been taught?

23 A Yes, sir.

24 Q Was it supported by anything else that day?

25 A Just the mobile home axle and the forks.

00072

Jerry Hogan - Direct Examination by Mr. Bunce

- 1 Q Okay. Did Mr. Corder stay to help?
- 2 A He wanted to go watch the news.
- 3 Q Okay. Now, that day where was the -- the -- the
- 4 SUV? Where was it positioned at on the forks?
- 5 A What do you mean?
- 6 Q All right. Was the -- the forks, were they -- were
- 7 they towards the front, towards the back of the vehicle, in
- 8 the middle of the vehicle?
- 9 A In the center of the fork.
- 10 Q And how far did the forks go in on the SUV?
- 11 A They went all the way through to the other side.
- 12 Q Okay. So the -- I'm going to show you Plaintiff's
- 13 Exhibit 1 here. All right. You seen this before?
- 14 A Yes, I have.
- 15 Q All right. And is that the loader we're talking
- 16 about?
- 17 A Yes, sir.
- 18 Q Now looking at this loader, was the -- was the SUV
- 19 back here by this guard or was it out to the end of the
- 20 forks?
- 21 A It was in the middle.
- 22 Q Okay. So it was centered on the forks. Okay.
- 23 All right. I want you to look through Exhibits 2
- 24 through 8 here and tell me if that's -- that's the same --
- 25 that -- that Caterpillar loader that you used that day; are

00073

Jerry Hogan - Direct Examination by Mr. Bunce

1 those all accurate?

2 A Yes.

3 Q Okay. Now that day, how high was the -- were the
4 forks?

5 A All the maximum, 5'4".

6 Q Okay. I'm going to show you Plaintiff's Exhibit 9
7 here. Have you seen this one before?

8 A Yes.

9 Q All right. Give me a moment and let's all get on
10 the same page here. All right. This is what we're talking
11 about, right, Mr. Hogan?

12 A Yes.

13 Q This one up here on the screen?

14 A Yes.

15 Q All right. You said that it was about 5'4" off the
16 ground?

17 A Yes, sir.

18 Q All right. Now, this photograph, does this
19 accurately depict what was going on out there that day?

20 A There was tires on it.

21 Q There were tires on the SUV?

22 A Yes.

23 Q Okay. As far as the way it's tilting there, is
24 that like it was out there that day?

25 A No.

00074

Jerry Hogan - Direct Examination by Mr. Bunce

- 1 Q Okay. How's it different?
- 2 A Because when the tires weren't on it; it was
- 3 straight.
- 4 Q What do you mean it was straight?
- 5 A The forks was down and going straight across.
- 6 Q Okay. This is before you got hurt, right?
- 7 A Yes.
- 8 Q Okay. Now, where was the axle at on there?
- 9 A It was up straight to be on the front axle.
- 10 Q Okay. And we're talking about the mobile home
- 11 axle, right?
- 12 A Right.
- 13 Q All right. It -- you're saying it was on the front
- 14 one?
- 15 A Yes, sir.
- 16 Q Okay. If you'll look over here with me, Mr. Hogan?
- 17 A Okay.
- 18 Q Are you talking about the one that's the closest to
- 19 the front of the vehicle?
- 20 A Yes.
- 21 Q Okay. And then from the pivot point here where the
- 22 guard is, coming down this way about how far down that fork
- 23 was the axle?
- 24 A When it lays flat --
- 25 Q Yes, sir?

00075

Jerry Hogan - Direct Examination by Mr. Bunce

1 A -- it'd be towards the front of the motor. It'd be
2 about a foot back.

3 Q Okay. All right.

4 MR. HENDRIX: Your Honor, I'm sorry, I didn't quite
5 hear that; did he say about a foot and a half?

6 BY MR. BUNCE:

7 Q You said it was about a foot back?

8 A Yeah, from the axle underneath on the fork.

9 Q Okay. But it was the, the mobile home axle was out
10 here under the fork about a foot from the -- this end?

11 A No, sir, all the way underneath the vehicle. When
12 the fork is going underneath the vehicle.

13 Q Okay. How -- how far was the axle from the point
14 where you stood out there?

15 A When I'm up underneath, I can touch it with my
16 hand.

17 Q Okay. Did you?

18 A No, sir.

19 Q All right. When did you first notice there was a
20 problem out there?

21 A The way it was leaning.

22 Q Okay. What was leaning?

23 A It was looking like it was about to slide off. The
24 fork looked like it was going to come out from underneath.

25 Q Okay. What was about to fall off?

00076

Jerry Hogan - Direct Examination by Mr. Bunce

- 1 A It looked -- the way it was tilting, you know,
2 because it was rocking.
- 3 Q Okay. The SUV was rocking?
- 4 A Yeah.
- 5 Q Okay. All right. And just before the SUV fell on
6 you, did you hit that axle?
- 7 A No, sir.
- 8 Q And just before the SUV fell on you did you brush
9 against the axle?
- 10 A No, sir.
- 11 Q Did you touch the axle at all?
- 12 A No, sir.
- 13 Q Did you do anything to cause that SUV to fall on
14 you?
- 15 A No, sir.
- 16 Q What part of you did it hit?
- 17 A The -- I was underneath it. The point I didn't
18 hear it because of the sand and it pushed me from my head
19 straight down.
- 20 Q Okay. And what happened to your body when that hit
21 you?
- 22 A It crushed my back.
- 23 Q All right. And how did you move?
- 24 A Renee and her mama pulled me out.
- 25 Q Okay. But when it hit you on the head, how did

00077

Jerry Hogan - Direct Examination by Mr. Bunce

- 1 your body move?
- 2 A It knocked me out.
- 3 Q Okay. And when you came to, what did you feel?
- 4 A I had to get out from underneath.
- 5 Q Okay. You were on the ground?
- 6 A Yes, sir.
- 7 Q All right. Did you feel any pain at that point?
- 8 A Yes, sir, I was in severe pain with my back.
- 9 Q Okay. And were you able to move out from
- 10 underneath it?
- 11 A No, sir.
- 12 Q All right. Well, actually let me step back a
- 13 little bit; were you underneath it?
- 14 A Yes, sir.
- 15 Q How much of you was underneath it?
- 16 A My whole body.
- 17 Q Okay. And which way were you facing so to speak?
- 18 A I was facing towards the road.
- 19 Q All right. I think there's only two of you that
- 20 know the layout out there so the road would have been which
- 21 way?
- 22 A It'd be, let me see. It would have been a
- 23 straight, be facing that way.
- 24 Q Okay. Facing out toward the front of the SUV?
- 25 A Yeah. No, it'd be facing where that block building

00078

- 1 A I couldn't move my legs.
- 2 Q You couldn't move your legs?
- 3 A No.
- 4 Q What did that make you think about?
- 5 A About am I all right.
- 6 Q Okay. Did you have any idea how bad you were hurt
- 7 out there?
- 8 A No.
- 9 Q All right. What happened when the ambulance showed
- 10 up?
- 11 A They started cutting my clothes off and checking to
- 12 make sure no bones was sticking through my skin.
- 13 Q Okay. And they put you on something?
- 14 A They put me on a backboard.
- 15 Q Okay.
- 16 A And took me there from Mr. Harold's place to
- 17 Lexington Hospital.
- 18 Q Okay. And that backboard, how were you held on to
- 19 it?
- 20 A Straps. They strapped me down.
- 21 Q All right. What could you see during that ride?
- 22 A All I seen they were doing -- doing -- checking my
- 23 blood pressure and stuff like that.
- 24 Q All right. How long did that ambulance ride take?
- 25 A I don't know. It seemed like a long time.

00079

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 Q Okay. So it was at least 5'4" off the ground?

2 A Right.

3 Q And I think you said after the accident I believe
4 you said that there were tires or something -- anyway, the
5 forks weren't all the way on the ground?

6 A No, it had tires on it.

7 Q Okay. But the fork had tilted some, but they
8 didn't go down and touch the ground? That's right? Is
9 that correct?

10 A Yes.

11 Q Okay. So if this makes it -- if it -- and I
12 really -- my eyes aren't that good, but if it's touching
13 the ground then that's wrong on the photo because the forks
14 didn't make it all the way to the ground on February the
15 18th?

16 A That's correct.

17 Q Okay. And the car was sitting on top of the forks;
18 is that correct?

19 A That's correct.

20 Q Okay. Now, I believe that you said that you were
21 somewhere -- and I'm not clear on where that is. I want to
22 get that cleared up -- when you saw -- and I'm trying to
23 look back at my notes. You saw that something began to
24 leaning and rocking, and I guess it was maybe the SUV or --

25 A That's when the pole kicked out and then it --

00080

Jerry Hogan - Cross-Examination by Mr. Hendrix

- 1 Q I'm sorry; say it again?
- 2 A That's when the pole kicked out and I couldn't get
- 3 out and it was rocking back like a teeter totter.
- 4 Q All right. I'm trying to get this straight. What
- 5 was rocking?
- 6 A The SUV.
- 7 Q The SUV was rocking. Is it your testimony that
- 8 something kicked the tires out, but the -- at that moment
- 9 the forks were still pretty much straight?
- 10 A Yes.
- 11 Q And that after that, it's your testimony that
- 12 something that caused them to tilt, at least part of the
- 13 way down?
- 14 A When it came down.
- 15 Q When you say it came down, they tilted; is that
- 16 right?
- 17 A No, sir, it just stayed flat. Until it get certain
- 18 part down to the ground and when the tires start touching
- 19 the ground, that's when it came, you know, like that; like
- 20 a 45 degree.
- 21 Q Well, what I'm trying to figure out is, and this is
- 22 my understanding. You're not saying that these yellow arms
- 23 came down, you're saying the forks came down?
- 24 A That's correct, with the SUV.
- 25 Q With the SUV. But the arms, these yellow arms --

00081

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 and I don't know what they're really called, they were
2 probably about that position; is that correct?

3 A Yeah.

4 Q Approximately in that same position?

5 A The forks was straight out.

6 Q The forks were straight out; okay. Do you have --
7 I would be terrible at this, I got to tell you. But do you
8 have any way of estimating how high that yellow arm is off
9 the ground?

10 A No, sir.

11 Q Well, I can't either, but it looks like it would
12 probably be 5 feet off the ground or maybe, maybe a little
13 more; maybe a little higher than the base of the forks?

14 A Well, the bottom of the forks is up in the air and
15 these two tires up under it, it would be 5'4".

16 Q Right and what I understand you to say is you're
17 not saying that this part down back here where the forks
18 attached came down; you're saying that the forks came down?

19 A Yes.

20 Q Okay. All right. And were you close enough when
21 you -- another thing too, I think I heard you say and I
22 wanted to make sure of this. When this was over, which
23 side of this SUV were you on? Were you on the loader side
24 or were you on the building side, the shed side? When it
25 was over; whenever the thing happened and you came to and

00082

- 1 you realized something had happened?
- 2 A The passenger side.
- 3 Q I'm sorry; say it again?
- 4 A The passenger side.
- 5 Q Which side?
- 6 A The passenger side.
- 7 Q Passenger side of the SUV?
- 8 A Yes.
- 9 Q Okay. So you were up under the forks?
- 10 A Yes.
- 11 Q And the forks were about at a 45 degree angle?
- 12 A They came down.
- 13 Q Where had you been when you say the -- the -- the
- 14 axle, the brace, kicked out? Where were you standing
- 15 whenever that took place?
- 16 A Right there in front; I'll show you.
- 17 Q Excuse me?
- 18 A All right. When it was straight across; I was on
- 19 this side right here, in the middle.
- 20 Q All right. Let me put my finger here. Are you
- 21 saying that you would have been standing right about there?
- 22 A Yes.
- 23 Q Now, that would have made you under the SUV when it
- 24 was level; is that right?
- 25 A Yes.

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 Q Okay. That's where you are -- you were when you
2 said it hit, it fell; is that correct?

3 A That's correct.

4 Q All right. Now I think you said that you had --
5 and again, I want to make sure I'm clear on this -- you
6 put -- you were the one in charge of putting the axle up
7 under it right?

8 A Mr. Harold ran the loader.

9 Q Right. And you put it up under the far end -- when
10 I say the far end, about where I'm touching in here,
11 somewhere in there, about a foot or so from the end of
12 the -- of the fork?

13 A From the fork, yes, sir.

14 Q So a foot and, maybe, you know, 18 inches whatever,
15 roughly in there --

16 A Yes.

17 Q -- from the end of the fork?

18 A Yes, sir.

19 Q Okay. And were you the one that took the little --
20 the little tire -- the spare tire that's not a real tire;
21 did you, are you the one that put it down in the ground?

22 A No, sir, it was there.

23 Q It was already there?

24 A Yes, sir.

25 Q Was it in the spot that you use or did you move it

00084

1 to put it up under the fork?

2 A It was, I didn't move it at all; it was there.

3 Q Okay. You've seen Mr. Harold and others drive

4 the -- the loader with heavier loads than that SUV on it,

5 haven't you?

6 A Yes, sir.

7 Q So there's no question that the loader would hold

8 the weight of the SUV?

9 A That's correct.

10 Q And that's even if and, it may be dangerous to do

11 this, but even if you didn't put the axle up under it, it's

12 actually strong enough to hold it?

13 A It'll hold to a certain point and then it'll come

14 down.

15 Q All right. Have you ever seen it come down before?

16 A Yes, sir.

17 Q Was it on this one or another one?

18 A Another one.

19 Q Not this one?

20 A No, sir.

21 Q This one is much bigger than the other fork lift

22 they had; is that correct?

23 A Yes, sir.

24 Q This is a heavy duty thing we're talking about; is

25 that correct?

00085

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 A Yes, sir.

2 Q In fact you probably could put two SUV's on it and
3 lift them if you wanted to, couldn't you?

4 A I don't know.

5 Q If you wanted to?

6 A I wouldn't done it.

7 Q I understand, but you've driven heavy equipment
8 before, haven't you?

9 A Yes, sir.

10 Q And you have driven and moved around at least some.
11 This --

12 A Not Mr. Harold's, no.

13 Q You never moved it?

14 A No, sir.

15 Q Okay.

16 A I worked at S&D Grading. I worked there for four
17 and a half years. I ran dozier's and all sort of dump
18 trucks and stuff like that.

19 Q And you knew how -- you would know how to run this
20 machine?

21 A Yes, sir.

22 Q Okay. Now, you mentioned the SUV we're talking
23 about here that's on the -- is that the same one in the
24 picture?

25 A Yes, sir.

00086

1 Q Do you believe that's the same one that was on
2 there when all this happened ---
3 A Yes, sir.
4 Q -- on February the 18th?
5 And you said somebody said they were going to buy
6 it?
7 A They bought the motor.
8 Q Who paid the deposit for the motor?
9 A A guy called me on the phone. I don't know his
10 name. All I know he lived in Batesburg.
11 Q All right. Wait a minute. I thought you said when
12 Mr. Bunce was talking to you that the procedure was that
13 somebody had to come in and pay a deposit?
14 A Yeah, a deposit. He came and got the deposit and
15 he asked me when you think it'll be ready and I said around
16 twelve o'clock.
17 Q All right. So he came and gave you the deposit?
18 A Yes, sir, and I gave Mr. Harold the money.
19 Q Okay. And how did you know how much the motor was
20 worth?
21 A Bubba -- I called Bubba and asked him.
22 Q Okay. When? That day?
23 A Yes, sir, I called him on his cell phone. I had a
24 cell phone and I called him at his work and asked him how
25 much he wanted for it.

00087

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 the right position.

2 Q You said not in the right position; what do you
3 mean?

4 A The center because if you ain't got it in the
5 center, it's going to teeter totter. It can slide off.

6 Q If what's not in the center?

7 A The forks.

8 Q In the center of what?

9 A The SUV.

10 Q Okay. Did you see anything that made you think it
11 wasn't in the center before you --

12 A No, sir.

13 Q Okay. So you're saying that, but you don't know
14 that that's what caused it because you didn't see anything
15 wrong from that from standpoint?

16 A No.

17 Q And you didn't see that any of the hydraulic lines
18 had broken or anything, did you?

19 A No, sir.

20 Q And you don't know that any of the metal on the
21 forks or things that connected to the -- to the yellow arms
22 as I call them -- you didn't see any evidence that the
23 metal had broken?

24 A No, sir.

25 Q You actually didn't see any evidence that any of it

00088

1 broke except you knew, you're saying that it came down?

2 A Yes, sir.

3 Q Well, you were the one that lined up the pole and
4 put it up under the fork?

5 A Yes, sir.

6 Q Okay. Whether or not you drove it down there and
7 did the lowering --

8 A I didn't.

9 Q -- you were the one that lined up the, the pole,
10 the axle -- the axle under the fork?

11 A Yes, sir.

12 MR. HENDRIX: Your Honor, beg your indulgence for
13 one moment.

14 THE COURT: Yes, sir.

15 BY MR. HENDRIX:

16 Q Mr. Hogan, do you remember back on October the 30th
17 of 2014, you came to my office and gave a deposition?

18 A No, sir.

19 Q You don't remember that?

20 A No, sir.

21 Q You don't remember coming and a young man -- I
22 didn't do it, but a young man in the office asked you a
23 bunch of questions and his name was Mr. David Allen; does
24 that sound familiar?

25 A No, sir.

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 Q You don't remember anything about that?

2 A No, sir.

3 Q Okay. You can't remember coming to take the
4 deposition and that was in 2014, right?

5 A I don't remember.

6 Q You don't remember it at all?

7 A No, sir.

8 Q Okay. You don't -- as far as you know, as far as
9 your memory allows you to know, you never gave a
10 deposition; is that what you're saying?

11 A That's correct.

12 Q But you remember what happened on the 18th?

13 A Yes, sir.

14 Q Okay. I'm going to ask you the same question that
15 your lawyer asked Mr. Corder, wouldn't your memory had been
16 better on the 14th about what happened than it would have
17 been in 2011?

18 A Not really. I remember was I woke up and I was
19 going to the hospital.

20 Q Well, there was nothing wrong with you. I'm going
21 to submit to you, and ask your attorney to stipulate that
22 he did, in fact, show up at our office and give a
23 deposition on or about October the 30th of 2014?

24 MR. BUNCE: Absolutely.

25 ///

00030

1 BY MR. HENDRIX:

2 Q All right. Your attorney remembers it. Are you
3 still saying you don't remember it?

4 A That's correct.

5 Q Okay. And do you remember it -- so you don't
6 remember saying in your deposition where you were sworn to
7 tell the truth, that some guy called you on Wednesday about
8 a motor and was supposed to come back on Thursday about it.
9 You're saying you don't remember that?

10 A All I remember is he called and needed a motor and
11 I asked him for what. And he said he's got a '97 Suburban
12 and needed a 350, and it was a Vortec.

13 Q A what now?

14 A A Vortec.

15 Q I'm sorry, I don't know what that is.

16 A It's a motor.

17 Q Okay. Okay. If you were correct in 2014 that the
18 man contacted you on a Wednesday about a motor and was
19 supposed to come back on Thursday, do you have any idea why
20 you were taking the motor out -- wait until Friday to take
21 the motor out?

22 A Because he was waiting to come up with the money to
23 get it.

24 Q Oh, okay. So do you remember the guy calling on
25 Wednesday?

00091

Jerry Hogan - Cross-Examination by Mr. Hendrix

- 1 A It wasn't a Wednesday, it was a Thursday.
- 2 Q Okay.
- 3 A Late Thursday afternoon before we closed.
- 4 Q All right. So now you're telling me he called you
- 5 on a Thursday?
- 6 A Yes, sir.
- 7 Q And just before you closed, he called you?
- 8 A Yes, sir.
- 9 Q He didn't show up?
- 10 A No, sir.
- 11 Q Did he ever show up on Friday or did you not see
- 12 him --
- 13 A He came that Friday.
- 14 Q What time did he come?
- 15 A Lunch time.
- 16 Q Okay. Same time you were getting your check?
- 17 A Yes, sir.
- 18 Q Okay. Why had you wanted your check at lunch time
- 19 on Friday?
- 20 A Because I had to pay my lot rent.
- 21 Q Okay.
- 22 A Because it's due the 5th of every month. If I'm a
- 23 day late they charge me \$5 per day.
- 24 Q Okay.
- 25 MR. HENDRIX: May it please, Your Honor, this is.

00092

1 the original -- in fact, if it would make it easier rather
2 than me ask him to read it, is it okay if I just publish
3 that part from his deposition on page 51 -- excuse me, I
4 may want to go to the previous page, start on the previous
5 page? Starting on page 50, line 17 through page, page 51
6 line 21, if we can do it that way, Your Honor.

7 This is from the deposition, Your Honor, of Mr.
8 Jerry Hogan taken Thursday, October the 30th, 2014, at my
9 offices at 206 East Main Street in Lexington.

10 THE COURT: Okay.

11 MR. HENDRIX: I did not take the deposition, David
12 Allen, a lawyer in my office did at the time.

13 THE COURT: Yes, sir.

14 BY MR. HENDRIX:

15 Q Question: All right. The time with the Explorer,
16 was that close to when, when you pulled, you were trying to
17 pull the motor on the Suburban?

18 Answer: Yes.

19 Okay. How did -- in thinking about the customer
20 with the Suburban, did you meet that person?

21 Answer: Yes, they came to the junk -- they came to
22 the junk yard.

23 Okay. What day did he come to the junk yard?

24 It was on a Wednesday.

25 Okay. And that was -- was that the Wednesday

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 before your accident?

2 Answer, yes.

3 The question was: Okay. All right. And that
4 Wednesday, was that when you called Bubba?

5 Answer: Yes.

6 Okay. And did the customer say he wanted it?

7 Answer: Yes.

8 Okay. When was he supposed to come back?

9 Thursday afternoon.

10 Okay. All right. So that -- what day was it you
11 were, you started pulling the motor for the Suburban?

12 That Thursday -- that Wednesday after lunch.

13 Now you don't remember at all giving us that
14 testimony?

15 A No, sir.

16 Q All right. Do you deny that that's an accurate
17 description of what you said?

18 A No, sir.

19 Q Okay. So you probably did say that?

20 A No, sir.

21 Q You think you didn't say that?

22 A No, I did not say that.

23 Q Okay. All right. Even though the court reporter
24 took it down that way, you said you think it's not right?

25 A Yes.

00094

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 Q Okay. Now did you call, have an occasion to call
2 Bubba and ask him specifically about a similar motor for
3 your truck?

4 A No, sir.

5 Q You never did that?

6 A No, sir.

7 Q Okay. Do you remember doing anything like that a
8 week or two before?

9 A No, sir.

10 Q You don't remember doing that?

11 A No, sir.

12 Q Okay. If Bubba said he remembered you specifically
13 did that, would you trust his memory?

14 A No, sir.

15 Q Okay.

16 A Because a Vortec -- the heads and intakes different
17 on a throttle body.

18 Q All right.

19 A But the block's the same.

20 Q Now, as I understand what you described,
21 something -- now nobody was in the, in the loader when you
22 were about to get under the car, were they?

23 A No, sir.

24 Q And while you got under that, suddenly it started
25 rocking and leaning on its own; is that right?

00095

Jerry Hogan - Cross-Examination by Mr. Hendrix

1 A Yes, sir.

2 Q And after that, you're saying that the -- the metal
3 axle got kicked out from under it somehow or other and that
4 it tilted part of the way down letting the SUV slide onto
5 the ground?

6 A It didn't slide all the way to the ground.

7 Q The SUV didn't slide all the way to the ground?

8 A No, sir.

9 Q And the forks didn't go all the way to the ground
10 either?

11 A When the vehicle came down, when it came down, it
12 landed on the tires.

13 Q Okay. The SUV landed on the tires?

14 A Yes, sir.

15 Q The forks didn't go all the way to the ground?

16 A No, sir.

17 Q Okay. You had seen the axle used before; is that
18 correct?

19 A Yes, sir.

20 Q And it held loads didn't it?

21 A Yes, sir.

22 Q What -- why would you have cut on the loader while
23 Mr. Harold was inside talking to the Smith ladies; why
24 would you have had an occasion to cut on the motor of the
25 loader?

00096

1 A I didn't do it.

2 Q Okay. Are you saying you didn't do it or you don't
3 remember doing it?

4 A I did not do it.

5 Q Okay.

6 MR. HENDRIX: I don't think I have any further
7 questions, Your Honor.

8 THE COURT: Okay. Redirect?

9 MR. BUNCE: No redirect, Your Honor.

10 THE COURT: All right. Mr. Hogan, you can step
11 down, sir.

12 THE WITNESS: Okay. Thank you.

13 THE COURT: Thank you. What are y'all going to do
14 about --

15 MR. BUNCE: Your Honor, we have that video of Dr.
16 Barwick that would fit in -- it will take a few minutes to
17 set it up.

18 THE COURT: All right. We've got a short video.
19 They tell me it's 16 minutes long. Do y'all want to take a
20 break while he sets it up or just stay right where you are?

21 A JUROR: We're ready to go ahead.

22 MR. BUNCE: Your Honor, I am literally setting up
23 this DVD player so -- no pressure.

24 THE COURT: No pressure.

25 Okay. If there's something you need to tell me,

Natasha Smith - Direct Examination by Mr. Bunce

1 NATASHA SMITH

2 after being duly sworn, testified as follows:

3 THE CLERK: If you'll have a seat and state your
4 full name for the record please.

5 THE WITNESS: Natasha Smith.

6 DIRECT EXAMINATION

7 BY MR. BUNCE:

8 Q All right. Ms. Smith, do you know Harold Corder?

9 A I do.

10 Q All right. How do you know Harold Corder?

11 A I was renting a mobile home from him and buying a
12 Blazer from him.

13 Q Okay. You know Jerry Hogan?

14 A I do.

15 Q How did you come to know Jerry Hogan?

16 A He would bring -- do the work to the mobile home I
17 stayed in and he would be up at the shop working on cars
18 whenever I come to make my payments.

19 Q Okay. And so when you made payments on your
20 vehicle, you would take it to, to Corder and Sons Office?

21 A I would.

22 Q Okay. And February 18th, 2011, that's -- you're
23 familiar with the incident that we're about to talk about I
24 believe?

25 A I am.

00098

- 1 A Not really.
- 2 Q Okay. All right. How long had you been there
- 3 before Mr. Hogan came in?
- 4 A I'm guessing, 15, 20 minutes.
- 5 Q Okay. And did you hear any of the conversation
- 6 between Mr. Hogan and Mr. Corder?
- 7 A Not really. I heard them talking, but I can't tell
- 8 you what all was being said.
- 9 Q Okay. All right then. And then Mr. Hogan, did he
- 10 leave the office?
- 11 A He walked out.
- 12 Q Okay. And after that what happened?
- 13 A We were, me and my mom and Mr. Corder were standing
- 14 out there talking inside the side of the office, the
- 15 carport, and we heard something and I -- we heard Jerry
- 16 hollering, screaming help me, help me; and we all ran
- 17 around through the office and out the side of the building
- 18 and a big SUV had come down on top of him and he was down
- 19 on the ground.
- 20 Q Okay. Any idea how much time passed between when
- 21 you saw Mr. Hogan and when that SUV came down?
- 22 A It probably wasn't but about 10 or 15 minutes after
- 23 he had walked out.
- 24 Q Okay. And now when -- when you got out there, what
- 25 position was Mr. Hogan in?

Natasha Smith - Cross-Examination by Mr. Hendrix

1 A Yes, sir.

2 Q All right. Has anyone suggested to you what you
3 should say here at the trial?

4 A No, sir.

5 Q Okay. Have you had any contact with Mr. Corder
6 after this?

7 A No, sir.

8 Q All right. Ms. Smith, are you familiar with any
9 other facts that might -- the jury needs to know about here
10 today with regard to the incident there?

11 A No, sir.

12 Q Okay. That's all the questions I have for you.

13 THE COURT: Cross examination, Mr. Hendrix?

14 CROSS-EXAMINATION

15 BY MR. HENDRIX:

16 Q Ms. Smith, my name is John Hendrix and I think
17 we've met before. You'd given a deposition sometime back
18 and so I kind of had some idea of what you would say today.
19 I do have a couple of questions for you.

20 When -- when you and your mom got there or shortly
21 thereafter, were y'all aware that Mr. Hogan was moving the
22 SUV around or something with the big forklift thing there?

23 A I knew the forklift had been moved, but I didn't
24 know there was a car on the forklift.

25 Q You could hear the forklift moving?

00100

Natasha Smith - Cross-Examination by Mr. Hendrix

1 A I -- I heard something, I can't say for sure it was
2 the forklift because we were inside the carport of the shop
3 and it's brick walls so you can't see out, but I assumed
4 that was what was running when we went out and seen the car
5 down on him.

6 Q Because -- well what I'm saying is, before that you
7 heard something moving around out back -- I'm going to call
8 it in the salvage yard area, that you understood to be the
9 forklift contraption, which is actually a front-end loader
10 that was holding the SUV; is that right?

11 A Yes, sir.

12 Q Okay. And did you see him moving that; you heard
13 it?

14 A Yes, sir.

15 Q And Mr. Corder was inside with you when you heard
16 that machinery running back there; is that correct?

17 A Yes, sir.

18 Q So it couldn't have been him that was driving the
19 machinery or operating the machinery; is that right?

20 A That's correct.

21 Q And you heard that machinery moving or running out
22 back before you heard Mr. Hogan holler that he needed help;
23 is that right?

24 A Yes, sir.

25 Q How much long -- how much before you heard him

00101

Natasha Smith - Cross-Examination by Mr. Hendrix

1 hollering was it that you had heard the machinery running
2 back in the back?

3 A Approximately 20 minutes or so.

4 Q Okay. So while Mr. Hogan, Mr. Corder was inside
5 talking to you -- you -- and I don't what your mom heard,
6 we haven't talked to her yet, but you heard the machinery
7 moving around in the salvage yard area; is that correct?

8 A I heard it running.

9 Q Running. Okay. Did it sound like it was getting
10 closer as best you can remember?

11 A Not that I can remember.

12 Q Okay.

13 MR. HENDRIX: You have the original --

14 Your Honor, we'd like to open this and make it an
15 exhibit.

16 THE COURT: Yes, sir.

17 MR. HENDRIX: And ask the witness a couple of
18 questions from it. Can I go ahead and do that?

19 THE COURT: Yes, sir, you may.

20 (Court's Exhibit Number 3 was marked for the
21 record.)

22 The COURT REPORTER: This is Court's Exhibit 3,
23 Your Honor.

24 BY MR. HENDRIX:

25 Q I'm going to give this to you and I'm going to ask

Natasha Smith - Cross-Examination by Mr. Hendrix

1 you to turn to some pages and -- and look at some stuff
2 with me, okay?

3 A Okay.

4 Q Turn to page 10 if you don't mind. Look at on the
5 left hand side there's some numbers going down the page,
6 those are -- I'm going to call them line numbers.

7 A Uh-huh (affirmative response).

8 Q If you go down to 17; this would be your answer to
9 a question.

10 Let's go back up to 13. You go up to line 13 the
11 question was: All right then. Well the date of the
12 incident with Mr. Hogan, do you recall about what was going
13 on there when you arrived at Mr. Corder's.

14 And starting on line 17, what was your answer?

15 A I said when I arrived, Jerry had been pulling a
16 tractor down that had a little forklift on the front of it
17 and he -- he picked up and -- he had a Tahoe up on it and
18 he was under the Tahoe working on it.

19 Q And go on.

20 A And I was standing in the shop talking to Mr.
21 Corder waiting on him to take my payment and we heard
22 something sound like something fell and Jerry was hollering
23 help, help, help and we all went running out there and the
24 Tahoe -- the forklift had dropped down and the Tahoe was on
25 him and had him pinned to the ground.

00103

Natasha Smith - Cross-Examination by Mr. Hendrix

1 Q Okay. Now when -- when you gave your deposition,
2 you told us that when you got there, Mr. Hogan was the one
3 that had the -- the SUV up on the forklift thing. You
4 called it a forklift, but I mean that's, but that's what
5 you said then; is that right?

6 A That is correct. I may have. I originally stated
7 at that time that I didn't remember much from the incident.

8 Q Okay. And when you got there, there were only two
9 people there, Mr. Corder, who was inside with y'all?

10 A Yes, sir.

11 Q And Mr. Hogan, who was out doing stuff in the yard
12 and passed through one time maybe 10 minutes before the
13 incident; is that correct?

14 A That's correct.

15 Q Now if you'd turn to page 29. Well I tell you
16 what, there was a question on page 28. If you go to page
17 28, line 23, do you see that?

18 A Yes, sir.

19 Q And the question was: Do you know anything about
20 whether he had been on, up on the forklift before you heard
21 him yelling.

22 And your answer starting on page 29 at the top of
23 the page was what?

24 A No, you could hear him driving the tractor around
25 and then heard it stop and I do recall one of them saying

00104

1 that there had been a hydraulic leak on the fork of the
2 tractor and I believe that may have been what caused it to
3 slowly drop down while he was under it.

4 Q And you were asked who said that?

5 A I said I don't recall which one said it, but I
6 heard it when I was out there.

7 Q Now you -- and you said that we asked you if this
8 was before the injury and you said?

9 A Yes.

10 Q Okay. Now if you turn to page 30, you were asked
11 another question and look at line -- when you said he was
12 driving, you're talking about Mr. Hogan there, right?

13 A Yes, sir.

14 Q Okay. Now on page 30, if you look at line 4, about
15 the middle of that line, it starts with but?

16 A Uh-huh (affirmative response).

17 Q What does that say?

18 A But I know he was out there driving. You could
19 hear the tractor running while we were talking.

20 Q Okay. And that he was Mr. Hogan because you were
21 in there talking to Mr. Corder?

22 A Correct.

23 Q Okay. And if you would also turn to page 38, line
24 21?

25 A Okay.

1 Q You were asked the question -- you on page 38?

2 A Yes, sir.

3 Q Line 21 said the question was: All right. Do you
4 recall whether that was in a conversation about the loader
5 or was that your impression or how you are connecting those
6 two.

7 And your answer was?

8 A That was my impression because he was asking about
9 a part, about needing a part off.

10 Q Okay. And you went on to say what else?

11 A And I'm assuming, I wasn't trying to listen in, me
12 and Mama were talking as well and then I heard something
13 about a hydraulic leak. So I'm assuming they were talking
14 about him picking the truck up with the tractor and the
15 forklift having a leak in it.

16 Q And you were then asked: Is it possible that the
17 leak had nothing to do with the forklift and your answer
18 was?

19 A Possibly.

20 Q Okay. Now having had an opportunity to refresh
21 your memory, is it your recollection today that you did
22 hear Mr. Hogan -- because there was nobody else there to do
23 it -- operating a piece of machinery in the salvage yard?

24 A Yes, sir, I heard one running.

25 Q Okay. And all that time when you heard that

Natasha Smith - Redirect Examination by Mr. Bunce

1 running, Mr. Corder was inside talking to you and your
2 mama?

3 A Correct.

4 Q So it couldn't have been him that was running it?

5 A No, sir.

6 Q Okay. The only other logical conclusion would be
7 that it was Mr. Hogan that was running it?

8 A Yes, sir.

9 Q Okay.

10 MR. HENDRIX: Nothing further, Your Honor.

11 THE COURT: Redirect?

12 MR. BUNCE: Yes, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. BUNCE:

15 Q Ms. Smith, now you were asked some questions about
16 your earlier testimony by Mr. Hendrix and I think you
17 brought it, when you started out there, you brought in your
18 testimony about when you arrived that Mr. Hogan was doing
19 certain things and that he was -- that he picked up a Tahoe
20 and he was working under it. Do you recall -- this was the
21 first question that he asked you, or that you were asked
22 about the incident; is that correct?

23 A Yes, sir.

24 Q Okay. And when you were testifying about what
25 was -- that he was working under, Mr. Hogan, did you see

00107

Natasha Smith - Recross-Examination by Mr. Hendrix

1 Q Did he seem surprised that he was there?

2 A No, sir.

3 Q Okay. That's all the questions I have, Your Honor?

4 THE COURT: Any recross?

5 MR. HENDRIX: Very briefly.

6 RECROSS-EXAMINATION

7 BY MR. HENDRIX:

8 Q Could it have been around lunch time, somewhere in
9 that area when you and your mom got there?

10 A I believe it was a little before lunch.

11 Q Okay.

12 A I'm assuming it wasn't quite middle of the day; it
13 was pretty early in the day.

14 Q Okay. So your belief is that it was lunch time or
15 a little before?

16 A Yes, sir.

17 Q Okay. Not later?

18 A No, sir.

19 Q Thank you.

20 THE COURT: Thank you, ma'am, you may step down.

21 All right. Yes, sir.

22 MR. BUNCE: Plaintiff calls Becky Smith (sic).

23 BECKY DAVIS,

24 having been duly sworn, testified as follows:

25 THE CLERK: Have a seat and state your full name

00108

Becky Davis - Direct Examination by Mr. Bunce

1 for the record.

2 THE WITNESS: Becky Davis.

3 DIRECT EXAMINATION

4 BY MR. BUNCE:

5 Q Ms. Davis, I'm Brad Bunce. I represent Mr. Hogan.

6 Have you and I -- have you and I ever met?

7 A I don't think so.

8 Q Okay. We had a phone conversation last week?

9 A I think so.

10 Q Okay. Have we talked any other times?

11 A No.

12 Q Okay. You know Harold Corder?

13 A Yes, sir.

14 Q All right. How do you know Harold Corder?

15 A My daughter, she went to make payments on a vehicle
16 and stuff.

17 Q Okay. Do you have any -- any social contact with
18 Mr. Corder outside of that?

19 A No.

20 Q All right. Do you know Jerry Hogan?

21 A Yes, sir.

22 Q How do you know Jerry Hogan?

23 A From my daughter.

24 Q Okay. Have you had any -- do y'all socialize
25 together?

00109

Becky Davis - Direct Examination by Mr. Bunce

1 A I mean I talk to his wife on Facebook, but that's
2 about it.

3 Q Okay. And were -- were you -- were y'all friends
4 before this incident with Mr. Hogan?

5 A I couldn't hear you.

6 Q Were you friends with the Hogans before this
7 incident?

8 A Well, I knew them, but I didn't go around them or
9 anything like that.

10 Q Okay, ma'am. All right. February 18th, 2011, do
11 you remember that day?

12 A Yes, when that vehicle fell on Jerry.

13 Q Okay. And I'm not going to ask you what you had
14 for breakfast that day, but do you remember being at Corder
15 and Sons that day?

16 A Yes, sir.

17 Q Okay. What happened when you got there at Corder
18 and Sons?

19 A Me and my daughter went in there and talked to
20 Harold Corder and we heard, we heard a boom and then heard
21 Jerry holler help, help, so me and my daughter went outside
22 and he was laying up under a vehicle and I went back and
23 told Mr. Corder, I said this man is out here laying under a
24 vehicle. I don't care; he ain't hurt; ain't nothing wrong
25 with him.

00110

Becky Davis - Direct Examination by Mr. Bunce

1 Q Okay. So how long were you there before -- before
2 you heard Jerry calling for help?

3 A I really don't know.

4 Q Okay. Well was it when you just arrived?

5 A It was a few minutes afterwards.

6 Q All right. Had you seen Mr. Hogan there that day
7 before you heard him calling for help?

8 A I think he came in and spoke and then went on out.

9 Q Okay. Did you hear any of the conversation?

10 A No.

11 Q Okay. You said he came in and spoke; who did he
12 speak to?

13 A He's a nice person. I guess he was speaking to us.

14 Q Okay. Did -- was Mr. Corder in the room when he
15 came in and spoke?

16 A Yes, sir.

17 Q Okay. Did Mr. Corder find it surprising that --
18 did he act surprised that Jerry Hogan was there?

19 A No, sir.

20 Q Okay. And -- and where did Jerry go after that?

21 A He went to the side of the building.

22 Q Okay. Now when he called for help, what did you
23 see when you got out there?

24 A I seen him up under the vehicle.

25 Q Okay. Do you remember what his position was?

00111

Becky Davis - Direct Examination by Mr. Bunce

1 down that road, so I don't know. You can hear all kind of
2 things.

3 Q Okay. Do you recall hearing anything out there?

4 A No.

5 Q All right. I'm going to show you a couple of
6 pictures here just so we can oriented.

7 Let me show you what's been marked as Plaintiff's
8 17. Does that look familiar to you?

9 A Yeah, that's Harold's shop.

10 Q Now, that's what we've got up here on the screen;
11 is that the same thing?

12 A Yeah, it looks --

13 Q Okay. And -- and so the office is over to the left
14 of the --

15 A Yeah, where that little window is.

16 Q Okay. And I'm going to show this next one here
17 that's been marked as Plaintiff's Exhibit 9. All right?

18 A Uh-huh (affirmative response).

19 Q Have you ever seen this photograph before?

20 A I've never seen this one before until just now.

21 Q Okay. Well, does that look like the machinery you
22 saw out there?

23 A Uh-huh (affirmative response).

24 Q Okay. All right. All right. So we're talking
25 about this one here. The -- does that look like the

00112

Stephen Fournier - Direct Examination by Mr. Bunce

1 Q Okay. Okay. Thank you. I don't have anything
2 further.

3 THE COURT: You can step down. Thank you, ma'am.

4 MR. BUNCE: Your Honor, may these witnesses be
5 excused?

6 THE COURT: Any objections?

7 MR. HENDRIX: No objection.

8 THE COURT: Okay. They're excused. Thank you.

9 MR. BUNCE: Your Honor, we call Stephen Fournier.

10 STEPHEN FOURNIER,

11 having been duly sworn, testified as follows:

12 THE CLERK: You may have a seat and state your full
13 name for the record.

14 THE WITNESS: My name is Stephen Fournier.

15 DIRECT EXAMINATION

16 BY MR. BUNCE:

17 Q Mr. Fournier, what is your occupation, sir?

18 A I'm a Civil Engineer.

19 Q Where did you attend university?

20 A Northeastern University, Boston Massachusetts.

21 Q All right. You obtained a degree there, sir?

22 A I did.

23 Q And which degree?

24 A Bachelors of Science Civil Engineering.

25 Q And after you graduated, did you start work?

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Stephen Fournier - Direct Examination by Mr. Bunce

1 A I did.

2 Q All right. What -- where did you work after you
3 graduated?

4 A The first ten years after graduation, I worked for
5 a series of consulting engineering companies basically
6 doing studies and designs and some construction inspection
7 on jobs in progress.

8 Q All right. And after that, where did you work?

9 A I worked for a General Contractor called CT Main
10 Construction.

11 Q All right. And where was that at?

12 A Originally the office was out of Waterville, Maine
13 and while -- while we -- while I was there, we got
14 purchased by a company out of Boston, Mass, and I worked
15 basically two jobs. One is a paper company in Jay, Maine
16 and another one was a hydroelectric facility in
17 Pennsylvania on the Susquehanna River.

18 Q And what sorts of job duties did you have there?

19 A I worked initially as a division engineer doing
20 design support for field staff. Then I became an area
21 superintendent of the paper mill job. We're doing --
22 performing working with mill engineers performing
23 maintenance work that the mill didn't want to perform. So
24 we were physically doing a series of smaller jobs. We had
25 a crew of, in the vicinity of about, maybe a 150 to 200

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Stephen Fournier - Direct Examination by Mr. Bunce

1 people that we managed on a daily basis, you know, for that
2 work. It was myself and another area superintendent that
3 divided the duties for that.

4 And then during the long weekends where there would
5 be holiday weekends and so forth, we went through a series
6 of shutdowns and then we'd work around the clock on those
7 shutdowns but basically doing those same kinds of jobs.
8 Only during the shutdown periods, portions of the mill
9 wouldn't be shutdown normally.

10 Q All right. And you indicated earlier your degree
11 is in Civil Engineering?

12 A Correct.

13 Q All right. How is that, what is the field of Civil
14 Engineering cover?

15 A Basically it's infrastructure in roads, bridges,
16 water treatment plants, waste water treatment plants,
17 pumping stations, anything that you would need basically
18 for, you know function. It doesn't involve necessarily
19 electricity or gas or things of that nature, but involves
20 houses, large buildings, you name it and it typically
21 involves the construction process.

22 Q All right. And where are you currently employed,
23 sir?

24 A Actually two companies. The primary employer is a
25 company called Robson Forensic. They're located in -- I'm

Stephen Fournier - Direct Examination by Mr. Bunce

1 located in the Charleston, South Carolina Office.

2 Q What is, what does Robson Forensic do?

3 A We provide litigative consulting. That's basically
4 we work for attorneys and others involving litigation,
5 where we utilize our particular disciplines and expertise
6 but -- as assistance in those functions.

7 Q Okay. And you said you worked primarily for
8 attorneys and parties who are involved in litigation in
9 that job. I guess you can divide the world up in the, in
10 the lawsuit world into the people who are bringing suits
11 and the people who are defending suits; is that fair to
12 say?

13 A Yes.

14 Q All right. Have -- do you work one side of the
15 fence?

16 A No, we work both sides and I think, you know, my
17 current split is probably about 75 plaintiff; 25 defense.
18 In the past it's more even around probably 55 plaintiff; 45
19 defense.

20 Q Okay. All right. And you said you had another --
21 you work with someone else too?

22 A Another company, a sister company of Robson
23 Forensic is a company called Fournier, Robson, and
24 Associates and that company basically provides
25 non-litigative consulting. You know, typically sometimes

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1 after some of our litigation work has been completed, we
2 still have a client that needs something fixed or something
3 taken care of and that's typically where we would perform
4 that kind of work where we design -- say the house move and
5 now it needs to be fixed; how do we fix it, how do we shore
6 it up, the wall that fell down and those kinds of things.

7 That's a couple of things that we've done. We've
8 also done construction support for contractors. We've
9 designed building frames, shoring systems, things of that
10 nature.

11 Q Okay. Do you hold any certifications, sir?

12 A I am a Licensed Professional Engineer in I think 13
13 or 14 states.

14 Q All right. And what -- what's a professional
15 engineer, what does that consist of?

16 A Well, basically you have to do, you have to pass
17 two eight-hour exams. Typically the first one is typically
18 right after school, they have an examination on engineering
19 fundamentals. Then you have to work, before you can sit
20 for your next exam, you have to work for an engineering
21 company in responsible positions for at least four years.
22 Once you do that, then you make application to a state and
23 then you can sit for the next exam, which is another
24 eight-hour exam in your area of discipline and my first,
25 first license was in the State of Maine where I was working

Stephen Fournier - Direct Examination by Mr. Bunce

1 at the time.

2 Q Okay. All right. And do you hold, and that
3 designation is P.E.; is that correct?

4 A Professional Engineer, yes.

5 Q And are you certified within the State of South
6 Carolina?

7 A I am.

8 Q And are you a member of any professional
9 organizations?

10 A I am, American Society of Civil Engineers and the
11 sister organization underneath that called Construction
12 Institute.

13 Q Do you have any experience using heavy equipment?

14 A Yes, typically in the construction process we use
15 all kinds of equipment, cranes, bull dozers, excavators,
16 scissor lifts, aerial lifts, you name it, front-end
17 loaders, a variety of equipment.

18 Q All right. Have you consulted on cases involving
19 heavy equipment?

20 A I have.

21 Q All right. Now you mentioned cranes earlier?
22 What -- what is the field -- what is rigging?

23 A Rigging is basically, it's the science, if you
24 would, of the process of -- of lifting materials in one way
25 or another. Typically with a crane, you have a hoist line

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1 that you drop down and you attach that to a load and
2 devices around the load in some way, shape, or manner, and
3 then you basically lift it up vertically, swinging into
4 position and then lower it and set it. That's one way of,
5 of -- of -- of rigging.

6 Another way of rigging is essentially lifting
7 something up from the bottom and that can be done via
8 jacks; that can be done via forklift type equipment, things
9 of that nature.

10 Q Okay. And so rigging doesn't just involve cranes?

11 A It doesn't just involve cranes. It involves the
12 process of lifting and lifting safely.

13 Q Okay. And the study of safe lifting is that a
14 subset of engineering?

15 A It is.

16 Q Have you consulted on a case involving rigging?

17 A I have.

18 Q Okay. Have you testified in other cases?

19 A I have.

20 Q All right. Have you been qualified as an expert in
21 the field of engineering in the courtroom?

22 A I have.

23 Q All right. Have you been qualified as an expert in
24 the field of rigging in the courtroom?

25 A I have.

Stephen Fournier - Voir Dire Examination By Mr. Hendrix

1 MR. BUNCE: Your Honor, at this time, I would offer
2 Stephen Fournier as an expert in the field of engineering
3 and rigging?

4 THE COURT: Any voir dire, Mr. Hendrix?

5 MR. HENDRIX: Very briefly.

6 VOIR DIRE EXAMINATION

7 BY MR. HENDRIX:

8 Q When you said that you received a P.E., your
9 Professional Engineering License, is that in a particular
10 discipline such as Civil Engineering?

11 A It is, sir.

12 Q Okay. So yours is in Civil Engineering?

13 A Correct.

14 Q Okay. And you indicated that you had been
15 qualified by some court as an expert in rigging?

16 A Yes.

17 Q Where was that?

18 A I'm not sure of the exact courts. Let's see here.
19 I -- I've done over forty crane and rigging cases. I'm not
20 sure how many times I've been actually qualified in court
21 on those cases, been over a dozen at least and I've -- you
22 know, testified in, in 13 or 14 states now.

23 Q Have you ever testified as a rigging expert in the
24 State of South Carolina?

25 A I have not.

1 MR. HENDRIX: Your Honor, I don't think I have
2 anything further. I'm going to leave it to Your Honor to
3 make a decision.

4 THE COURT: All right. He's qualified.

5 Ladies and gentlemen, typically witnesses can only
6 testify about things they've observed through one of their
7 senses. There is an exception under the law for people who
8 have because of the expertise they've achieved in their
9 given field, are deemed experts in their field and if a
10 witness is qualified as an expert, he or she may give an
11 opinion about things that they've observed through their
12 senses. Usually witnesses are not allowed to give opinions
13 about things they've seen or heard or observed, but experts
14 are allowed to give opinions. However, the credibility of
15 all witnesses, including expert witnesses, is entirely up
16 to you.

17 So yes, sir, you may proceed.

18 DIRECT EXAMINATION CONTINUED

19 BY MR. BUNCE:

20 Q All right. Mr. Fournier, have you examined some
21 materials in this case?

22 A I have.

23 Q All right. What source of materials have you
24 examined?

25 A Deposition testimony, a number of photos, the

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 complaint, answers in the discovery process, as well as the
2 I guess post-incident investigation performed by the
3 Department of Labor.

4 Q All right. These are the types of materials you
5 typically rely on?

6 A Yes.

7 Q And did you consider any reference materials?

8 A I did. The number of standards that I referred to
9 in my deposition testimony; and I'm sure I will speak about
10 today.

11 Q Okay. So have you reached any conclusions
12 regarding the cause of this -- of Mr. Hogan's injuries?

13 A I have.

14 Q All right. And what are your conclusions?

15 A Basically the first and biggest one is essentially
16 a failure to provide proper blocking or cribbing underneath
17 the lifted load. You're not supposed to have personnel
18 working or located underneath any elevated load, whether
19 it's being elevated by crane or it's being elevated by the
20 forks on a forklift or a modified loader configured like a
21 forklift. But you aren't supposed to have people working
22 underneath there unless there's some kind of secondary
23 bracing, cribbing, or blocking that's underneath that
24 vehicle in case something goes wrong because what happens
25 is you've got a very heavy load above somebody and if

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1 something does go wrong, it's going to fall and injure that
2 person and then the potential for a serious injury and
3 death is very great.

4 So that's one of the reasons that you need to have
5 in all instances some kind of blocking, secondary mechanism
6 if you have people working underneath it.

7 Now you can have situations where you're lifting
8 and moving things and nobody around, then you don't have to
9 have that blocking in place, but when you have personnel
10 working underneath -- underneath in very close proximities
11 to an elevated load, then you need, needs the support of
12 safety.

13 Q Okay. All right. With that blocking and cribbing
14 issue there, you said there needed to be a secondary
15 mechanism?

16 A Correct.

17 Q All right. Have you considered the axle that was,
18 that was used by Corder and Sons, the secondary mechanism?

19 A I have except that when you do this blocking and
20 cribbing, you need at least two forms of support because if
21 you have -- if the primary means of lifting fails, forks or
22 load line or something, and you only have one -- one means
23 of support underneath that load, then the only way for that
24 to be effective at that point in time would be -- when
25 you're lifting underneath -- would have to be located so

1 it's underneath the center of gravity of that load.
2 Otherwise it'll, the load will fall over or topple over.

3 So you need at least two means of, two means of
4 support underneath a load and in this particular instance,
5 they only had one, one axle that they were using and as far
6 as that was concerned, the position of that axle relative
7 to the load was not really functioning, you know, properly
8 and --

9 Q Why is that?

10 A Well, you had a situation where the -- you have the
11 forks that are on the, that are attached to where the
12 loader bucket used to be, but you have forks out there and
13 the -- my understanding from the testimony is that the --
14 the axle that was used as a secondary support in this
15 instance was located basically at the base of the fork of
16 the -- nearest the -- the loader portion of the -- of the
17 fork instead of at the other end of the fork. So
18 effectively what you have is the forks, the length of the
19 forks themselves supporting the vehicle, the vehicle load
20 and the forks, and, and the secondary support is back on
21 the -- on the machine side of it. So effectively, you've
22 got cantilever action. You've got a kind of like a
23 somewhat of a diving board, if you would, when you have
24 something sticking out like this, you've got the load of
25 the vehicle sitting on it, but there's no means of support

1 over here; it's over here. So if this thing -- if the --
2 if the forks can tilt, essentially it's tilting, going to
3 be tilting above the means of support here, but the forks
4 can still tilt because the loads being applied outboard of
5 that means of support.

6 Q Okay. And the -- the support he was going to use
7 should be at the end of the, at the end of the forks?

8 A Correct. Ideally both ends, but -- but given two
9 means of support on both sides of the load so you're
10 bracketing the load. But -- but if you, if you're only
11 picking one, in my mind, the way to have it is essentially
12 out at the far end so that you're being supported by the
13 load -- by the loader itself and its hydraulic system and
14 this secondary means of support, which would be out at the
15 end. So it would -- it would -- in that position, that way
16 would not allow a lot of -- not permit the forks to tilt if
17 it was out at the end. Because it was positioned in the
18 manner that it was. The forks tilted and when the forks
19 tilted, essentially that could cause the -- if it tilted
20 enough, could cause the load to shift and slip off the, of
21 the forks.

22 Q Okay. These conclusions about the blocking and
23 cribbing, where, is this just out of your mind that you're
24 saying that they should have blocking and cribbing?

25 A No.

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 Q Where -- where do you get that?

2 A There's a variety of standards that we talk about
3 and you have to kind of combine them, if you would. The --
4 there is a standard, it's the MC Standard B56, it's safety
5 standards for rough terrain forklift trucks.

6 Q Okay. Let's back up a little bit. When you're
7 saying standards, what do you mean?

8 A Standard is essentially, it's a -- ANSI -- it's a
9 group of people called American National Standards
10 Institute. It's a consensus group that, that encompasses
11 equipment manufacturers, construction personnel, safety
12 personnel, a wide variety of companies, and organizations
13 are involved in -- in these ANSI Organizations and they
14 have all kinds of -- of -- of standards for various things.

15 This particular one is for a rough terrain forklift
16 truck, which this vehicle was basically functioning as. It
17 was basically a front-end loader that was modified in some
18 fashion by removing the bucket of the front-end loader and
19 attaching a fork mechanism to it.

20 Q Yes, sir.

21 A So -- but it was functioning for the most part as
22 a rough terrain forklift truck.

23 Q Right.

24 A So I used that standard as --

25 Q Is ANSI -- these ANSI standards, do you just them

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1 to actually catch people after the fact?

2 A No, this is -- this is a National Consensus
3 Standard they recognize nationally as -- as either design
4 and/or use standards and performance standards.

5 Q Okay.

6 A For a variety of topics and there are a number of
7 organizations that when you get the materials from
8 basically say that this material complies with and one of
9 the things that it said that you may be both familiar with
10 is buy a ladder, a step ladder or extension ladder at a
11 high risk or Lowes or Home Depot, you'll see on one of the
12 ladder labels they have conforms to ANSI A-141234 or 5 and
13 also OSHA and things of this nature.

14 So it's a standard that a lot of manufacturers try
15 to -- try to meet and -- and -- and tell the using public
16 that -- that the, the products that they manufactured to
17 these standards.

18 Q Okay. And so this ANSI --

19 A 56, B-56-6.

20 Q All right. That's just some arbitrary number?

21 A Arbitrary number that they've chosen.

22 Q But it's for rough terrain forklifts?

23 A Rough terrain forklifts, which in my opinion, most
24 resembles the -- the modified equipment in this case.

25 Q Okay. How is the loader used here different than a

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 purpose-built-rough-terrain forklift?

2 A The primary difference is that, that rough terrain
3 forklift would typically have a telescoping boom on it. It
4 has the capability of lifting as a front-end loader does
5 and in rough terrain basically is an articulated body that
6 allows the boom then to swing or move in one direction or
7 another and then -- then you'd tilt the forks. So you
8 have -- you can go up and down with a boom and it can go,
9 telescope in and out and then you have the forks themselves
10 that lift. So -- but these typically always, all these
11 devices have a load chart on them. So they tell you if you
12 had a particular load that you can only use it in these
13 configurations and if you exceed the loads on this, it's
14 unsafe to use.

15 Q Okay. At the risk of getting too far afield here,
16 when you say a telescoping boom, you mean that the forks
17 themselves can push out and in?

18 A Correct. That's not the forks, but the boom that
19 attaches to the forks.

20 Q All right. Then the difference between this
21 vehicle and a purpose-built-rough-terrain forklift, you see
22 it as coming into play in this case at all?

23 A Not really, no.

24 Q Okay. All right. So what did the standards have
25 to say about -- that applied to this?

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1 A The -- there's a couple of standard things that a
2 I'm thinking that are kind of customary and it says the
3 purpose of this standard is to promote safety through the
4 design, the structure, application, operation, and
5 maintenance of rough terrain forklifts. Then it says that
6 the rough terrain forklift trucks can cause injury if
7 improperly used or maintained.

8 But the key one in this instance is, it's under
9 Section 6, which is operating the safety rules and
10 practices and it's paragraph under Section 6-2, which is
11 general that says paragraph 6.2.7 says do not allow anyone
12 to stand or pass under the elevated portion of any
13 rough-terrain-forklift truck whether empty or loaded.

14 That's the -- the -- you know, the basic animal
15 here is that we have a rough terrain, a vehicle functioning
16 as a rough-terrain-forklift truck.

17 Q Is that -- these ANSI standards, are those things
18 that are available to the public?

19 A The public could take a look at them online, yes,
20 could order them and -- and -- and get them, yes.

21 Q These aren't secret things that are only available
22 to engineers?

23 A That's correct.

24 Q Okay. Is this ANSI standards something that the
25 operators of the vehicles should be familiar with?

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 A Typically what happens -- a bunch of what's in the
2 ANSI standard or portions of the ANSI standard anyhow, are
3 generally found in an operator's manual, which is typically
4 found in the vehicle itself. So you have operating
5 instructions and things of this nature that should be in
6 the operator's manual, which should be in the vehicle or
7 the piece of machinery. If there's not a typical
8 operator's manual -- owner's manual for this thing, doesn't
9 necessarily have the design standards, if you would, for
10 that ANSI would have in the standard. That would have it
11 there, but the operational safety stuff that's located in
12 ANSI would typically be in the owner's manual or operator's
13 manual.

14 Q All right. Are there any other standards you
15 believe are relevant to the issues of blocking and
16 cribbing?

17 A Yes. A companion standard to that is -- is -- is
18 a -- there's another organization called AEM, it's the
19 Association of Equipment Manufacturers. They have produced
20 a -- a whole series of -- of standards for various pieces
21 of equipment typically used in either the construction end
22 or -- or industry and they have one also for a fork -- a
23 rough-terrain forklift.

24 It has -- it's kind of more general in nature than,
25 than some, as specific as ANSI. On page 24, under -- under

1 a section called Operate Safely -- it's a section called
2 lifting, lift a load safely and they have a -- a series of
3 bullet points in there that talks about, says never suspend
4 or free rig a load without written instructions and
5 approval from the equipment manufacturer. Suspended loads
6 are very dangerous and then it says adjust the spacing of
7 the forks so they engage the pallet or load at its maximum
8 width. Approach the load slowly and squarely with the
9 forks straight and level. Never attempt to use just one
10 fork to lift a load and then never operate the forklift
11 without a legible load shot. Though you got some
12 information there and -- and that's pretty much it for
13 there, other than talking about transporting loads and in
14 this instance, they're not talking about lifting loads in a
15 manner that we, that was being lifted. In this instance,
16 it talked about not using a tether or a tag-line to
17 restrict load movement and --

18 Q What would a tag-line be?

19 A Basically a rope or a strap or, or chain of some
20 kind to prevent a load from swimming and that's typically
21 from a suspended load from like a crane, a wire rope or
22 sling or something of that nature.

23 Q Would a tag-line or tug-line approach apply to
24 lifting a load?

25 A No. Another standard is ANSI A-10-42. Another

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 ANSI organization, they produced a whole series, about two
2 dozen standards, the A-10 series for various procedures and
3 involvements in construction activities. This particular
4 one is safety requirements for rigging qualifications and
5 responsibilities. This is not so much on how to lift like
6 to make sure that -- that people that are performing
7 lifting operations are trained and qualified to perform
8 those operations.

9 Q All right. And so that sets out who's qualified to
10 design a lifting operation?

11 A Yes.

12 Q Okay.

13 A And it defines competent persons, qualified
14 persons, qualified riggers, training and -- and one of the
15 things that they consider is that -- that an operator --
16 they have a section in there under the rigging thing called
17 critical operations and then they define a number of
18 operations that you can perform that they -- they consider
19 to be critical.

20 When they're critical they even have to have more
21 checks and balances and safety aspects involved and one of
22 them is lifting over personnel. You're not supposed to
23 have -- you're not supposed to do that. And then
24 underneath that they also say that -- that you need
25 temporary support for a load to set on or moved across

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1 temporary structures or support or when cranes or hoists
2 set up on or supported by temporary structures. Temporary
3 structures supports during the rigging process. You need
4 basically temporary supports for the rigging process
5 depending upon the situation.

6 Q And that would apply -- would that apply if you're
7 simply moving vehicles out in the field?

8 A Yes. And anytime you're using a mechanical,
9 mechanical advantage and that -- that's effectively what
10 we're doing with -- with these, with this structure,
11 modified front-end loader that's modified to be a
12 rough-terrain forklift. They're using mechanical advantage
13 to be able to lift the -- the vehicle and elevate it. So
14 using it with mechanical advantage.

15 Q And under, when you know you're moving something in
16 a -- in a field from place to place, is that a critical
17 operation or a safety operation?

18 A It's not a critical operation. The act of lifting
19 itself is not a critical operation, but when you put
20 personnel underneath it in very close proximity to it
21 without temporary supports, it becomes a very critical
22 operation.

23 Q Okay. All right. So considering what -- what the
24 ANSI standard is and says about different qualifications
25 and who can design these sorts of operations as I

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 understand it, applying to when there's going to be a load
2 above people working underneath?

3 A That's correct.

4 Q All right. Is anyone from Corder and Sons
5 qualified to design that?

6 MR. HENDRIX: Objection, Your Honor, I don't think
7 he would be able to testify --

8 THE COURT: Sustained.

9 MR. BUNCE: All right.

10 BY MR. BUNCE:

11 Q Have you examined Mr. Corder's -- are you aware
12 through his deposition and testimony of Mr. Corder's
13 education with regard to salvage operations?

14 A I am.

15 Q All right. Are you aware of anything in there that
16 would qualify him to be a rigger?

17 MR. HENDRIX: Same objection, Your Honor. I think
18 he's trying to get around the same thing. He's asking a
19 limited question and wants to know is that -- based on that
20 is there anything said he's qualified.

21 THE COURT: Well, I think he's laid an adequate
22 foundation. I'll overrule that objection. Go ahead.

23 THE WITNESS: I have, but I don't think he is. The
24 standard defines a qualified person as one who possesses
25 a -- by a recognized degree, certificate or professional

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1 standing or who has by extensive knowledge, training and
2 experience, has successfully demonstrated an ability and
3 competence to solve problems related to the subject matter
4 and work and in this mind, in this particular case, it's my
5 opinion that the problems that were encountered weren't
6 successfully solved with the use of a single brace and the
7 type of brace that was used was not in my mind a successful
8 demonstration of -- of solving that -- that lifting problem
9 and they also define competent person in the standard as
10 one who is capable of identifying existing and predictable
11 hazards in the surroundings or working conditions that are
12 unsanitary, hazardous, or dangerous to employees and who
13 has the authorization to take prompt corrective measures to
14 eliminate them.

15 What this is basically saying is that you recognize
16 the danger; you take care of it. But you've also got to
17 recognize a potential danger and in this particular
18 instance, putting people underneath, you know, suspended
19 loads is -- is a danger and you need, you needed to rectify
20 that danger or eliminate that hazard by either not putting
21 people underneath that suspended load or providing
22 necessary temporary supports for that.

23 BY MR. BUNCE:

24 Q All right. So getting to the procedure that was
25 Corder and Sons design and utilized out there as you

1 understand it, was it safe?

2 A In my opinion, it was not safe.

3 Q Did the, now this axle was a very substantial piece
4 of metal, correct?

5 A Correct.

6 Q All right. Is the compressive strength of it, is
7 that not enough to overcome the issues?

8 A I don't have a problem with the compressive
9 strength that that -- I have two -- two problems. One is
10 it was single and then again anytime you're using supports,
11 you have to use them in pairs.

12 Q Okay.

13 A There have to be at least two. So you need, if
14 you're going to use one, you need two. The other thing you
15 have is -- is essentially where it was, where it was
16 utilized and how it was utilized; did he have the ability
17 if the -- if the axle came up and was supporting the fork,
18 you would have bearing over the -- over the -- over the
19 axle, but if the -- if the fork then tipped, instead of
20 having bearing over -- over the complete axle, you'd end up
21 basically having point bearing or edge bearing and I may,
22 can I use -- use this --

23 Q I've got a little bit lost here. What do you mean
24 by bearing?

25 A Bearing is essentially the way that they had

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Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 intended to use this -- this thing is -- is this axle went
2 underneath the fork like this to hold it in place, but they
3 only had one of them. Now we've heard that post-accident
4 that, that this thing was, the forks were tilted. So if I
5 take like my fork in this instance like this and I tilt it
6 instead of bearing over the top. The whole thing, I now
7 only have bearing and I'm actually creating a horizontal
8 force on the top of that -- on the top of that stand and
9 you get that horizontal force that I can kick that thing,
10 kick that thing over. And then you have no support at all
11 and then you can have addition tilting action, you know of
12 the fork.

13 Q Okay. So -- so what you're referring to is that,
14 that the surface area that's making contact is the problem?

15 A Correct.

16 Q Okay. Is there any issues with regard to using a
17 smooth fork; is that causing the issues here?

18 A No, I mean that's, that's, the forks would have to
19 be smooth in order to slide in and slide out and function
20 that the way they were -- they were intended, but you know,
21 that's another reason why you don't want to use essentially
22 smooth metal against smooth metal. You know, that can
23 become a slippery surface and a slippery combination within
24 itself.

25 Q All right. So what would have been an effective

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Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 solution out there?

2 A Essentially either two sets of cribbing and/or a
3 stand of some kind that, that was stationary, stable and
4 structurally sound.

5 Q Okay. When you say cribbing, what do you mean by
6 cribbing?

7 A Essentially, you know, blocking.

8 Q We're going to --

9 A Blocking, I'm talking about essentially a series of
10 4x4's, 6x6's, things of this nature interlaced and back and
11 forth so you end up, you know, stacking them up so if a
12 load falls, it only falls an inch or two down onto the
13 cribbing and beyond that point, you don't even have to have
14 that two extra inches to even put shims underneath there to
15 make up the difference between the end of the blocking and
16 the load itself. So if you have blocking underneath there,
17 that basically is the temporary support. Again, you need
18 two in order for it to -- to be stable.

19 Q Okay. Would two mobile home axles have been
20 sufficient cribbing?

21 A In my mind, no. Again, they're talking about,
22 you're talking about two forks and you're talking about
23 bracketing a load. So, you know, typically you have to
24 have something in front across each fork and something on
25 either side of the load.

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1 Q All right. A stand would also work? A stand would
2 also work? A stand would also have worked?

3 A Yeah, a jack stand or something of that nature,
4 something that's made for that, you know, for that specific
5 purpose, you know, could have been utilized as well. But
6 again you'd need at least two, if not in that instance if
7 you're using individual stands for -- again to, one for
8 each fork and one to bracket, you know, the bracket loads.
9 So this is, you know, a jack stand is essentially a tripod
10 with a threaded -- threaded rod that goes up through and --
11 with a cradle and -- that holds the load. You know,
12 typically you have seen those in, in some service stations
13 things of that nature. It can be, you can have them sort
14 of telescoping, essentially metal tubing with holes in them
15 so you can pull them, telescope them up to the right
16 height, put a in through there to hold it in place and so
17 it's adjustable and then having a means of support on the,
18 on the top of the stand and enough base support so it's not
19 tippy.

20 Q And the nature of the work that was going on
21 underneath it and Corder and Sons there, does that have any
22 bearing on it, on the nature of the supports that were
23 needed?

24 A Well, you need supports that only -- that not only
25 take care of essentially a vertical load if applied, but

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 also any horizontal movement that may be part of the
2 process of -- in this case of dismantling the -- a portion
3 of the vehicle, parts of the vehicle or even the motor when
4 you're applying torque or pressure to loosen up nuts,
5 bolts, fittings, things of that nature on the car, there's
6 going to be some -- some -- some pushing and pulling,
7 tugging, some horizontal forces applied so whatever system
8 you're utilizing in the lifting end of the temporary
9 supports have to sustain not only vertical load, but the
10 horizontal load as well.

11 Q Okay. So your testimony here, was Mr. Hogan
12 properly trained in working underneath a load?

13 A In my opinion, no.

14 Q There's been some testimony about may or may not
15 have been a hydraulic leak out there. Could the terminal
16 event of the SUV falling there, could that have occurred in
17 the absence of a hydraulic leak?

18 A Could you rephrase please.

19 Q Sure. Mr. Hogan's testified that there was some
20 rocking going on just before, before it fell. There -- did
21 this case necessarily, the terminal event of the SUV
22 falling, did that necessarily -- was it necessarily a
23 hydraulic leak that precipitated that?

24 A No. Again, that -- if we had the proper temporary
25 supports underneath this device, no matter what happened,

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1 that the load would have been safely supported regardless
2 whether there was a hydraulic leak, inadvertent movement of
3 the, you know of the -- of the vehicle that was being
4 worked on or anything of that nature. If we had the proper
5 and safe temporary support underneath that thing, we
6 wouldn't be here today.

7 Q So in your opinion, when was the critical failure?

8 A In my mind, the critical failure is the lack of
9 support.

10 Q All right. So whenever the whole, the process was
11 designed?

12 A Yes, effectively -- effectively with, you know, by,
13 by putting personnel underneath there without support was,
14 you know, setting in motion a dangerous condition that in
15 this instance came to pass.

16 Q Okay. Does it matter who put the axle under the,
17 the fork that day?

18 A No.

19 Q This -- these standards that you referred to from
20 ANSI and other organizations, were those available in the
21 1970's?

22 A Yes.

23 Q Okay. Would it have been standard in the
24 engineering, rigging field in the 1970's to know not to
25 work under a suspended load?

00141

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 A Yes.

2 Q Is working under a suspended load a recognized
3 hazard that could cause serious injury?

4 A Yes.

5 Q And you -- you're aware there's some testimony that
6 there was actually a stand built out there at Corder and
7 Sons?

8 A Yes, a rack.

9 Q A rack. Have you seen that?

10 A I've not seen it in person; I've seen photos of it.

11 Q Okay. And was the one you've seen, does it appear
12 to be adequate?

13 A It does.

14 Q Okay. And so if that had been in place before, at
15 the time of Mr. Hogan's injury, would it have prevented
16 this injury?

17 A Absolutely.

18 Q All right. Do you have any other opinions to share
19 with the jury here today?

20 A I don't believe so.

21 Q All right. The -- the stand that you've seen, the
22 materials in that, how much would that cost?

23 A It'd be a few hundred dollars, in that
24 neighborhood.

25 Q Is there anything there that -- that is exotic

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1 materials?

2 A No, the standard things, the -- they utilized here
3 was essentially a four vertical columns in the, in the
4 corners, I don't know whether those are 8 x 8's or 10 x
5 10's, but just basically straightforward, you know, lumber.
6 They had some, the balance of the lumber there is
7 essentially 2 by material used as cross-bracing and
8 bracketing from end to end and I think beyond that, the
9 only other non-board member was essentially that they have
10 two racks, if you would, that the vehicle would, would run
11 on that they placed on top of that is essentially is a
12 landing spot. Those are standard, straightforward
13 equipment that they probably had in the shop or around, but
14 stuff that's straightforward in the automotive, automotive
15 world.

16 Q Okay. And those 8 x 8's, 10 x 10's, are those hard
17 to get a hold of?

18 A No, not at all. I mean I know at least up to 8 x
19 8's would be standard you can get at Home Depot or Lowes or
20 anything of that nature. Beyond an 8 x 8, you may have to
21 go to a specialty lumber shop or something like that to get
22 a hold of it, but I think they're readily available.

23 Q By readily available, would it take months to get a
24 hold of one of those?

25 A I would think it --

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 MR. HENDRIX: Objection, Your Honor, I don't
2 believe there's anything in his qualifications that would
3 let him know what's available and whether you have to order
4 and how long it will take.

5 MR. BUNCE: May I lay a foundation, Your Honor.

6 THE COURT: Sure you can attempt to do that.

7 BY MR. BUNCE:

8 Q In the process of your -- your engineering in the
9 past, have you actually built these sorts of things?

10 A Not these types of things, but I've had occasion
11 to, you know, order materials and so forth and -- and --
12 and look around for things that may not be readily
13 available in Lowes and -- and typically you can find
14 something some place that would be either on the shelf or
15 be readily available in a very short period of time.

16 Q So you -- you've actually built -- built items
17 using non-standard lumbers before?

18 A Yes.

19 Q Okay. And based on that experience, how long would
20 it take to get a hold of something like a 10 x 10?

21 A I would say typically less than a week.

22 Q Thank you. That's all the questions I have.

23 THE BAILIFF: The jury needs a restroom break.

24 THE COURT: All right. We'll take a short --

25 MR. HENDRIX: Okay.

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1 THE COURT: How, okay. We'll take a short break.
2 Don't talk about the case.

3 (The jury left the courtroom at 11:29 a.m.)

4 THE COURT: Okay. How much longer do you think we
5 have with Mr. Fournier?

6 MR. BUNCE: I'm finished, Your Honor.

7 MR. HENDRIX: I'm not exactly sure how long it's
8 going to take.

9 THE COURT: Okay. I'm just trying to plan for
10 break.

11 MR. HENDRIX: I'm going to guess maybe a half an
12 hour; it may not be that long, it could be a little longer,
13 but I'm just saying roughly there and I'm trying to figure
14 out how long are your, I'm trying to figure out whether to
15 tell my witness, who is, do any of the them need to try to
16 be here, are we just going to shut down when he gets
17 through and come back tomorrow afternoon because I think
18 we're clearly going until tomorrow afternoon.

19 THE COURT: Right. How many more witnesses do you
20 have Mr. Bunce?

21 MR. BUNCE: We have one wife witness, Ms. Hogan.

22 THE COURT: Right.

23 MR. BUNCE: Which I don't anticipate to be take
24 greater than a half hour. We have the deposition of Dr.
25 Barwick, which we determined yesterday was about 16 or 17

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 minutes, Dr. Lozanne, I was looking for, I'm sorry, Your
2 Honor, both of the copies are -- I'm looking to see how
3 long that one took.

4 MR. HENDRIX: I was thinking, Your Honor, roughly
5 about 2 hours for all of them; does that sound about right.

6 MR. BUNCE: About right. Dr. Brabham is less than
7 an hour.

8 MR. HENDRIX: And so we've got two hours for the
9 doctors you say and plus Dr. Brabham's or does that include
10 Dr. Brabham?

11 MR. BUNCE: Dr. Brabham is an hour.

12 MR. HENDRIX: Dr. Brabham is not a medical doctor;
13 he's a PhD doctor and I'm talking about the medical
14 doctors.

15 MR. BUNCE: Dr. Lozanne's is 40 minutes. So--

16 MR. HENDRIX: And that's about an hour for that one
17 and the short one.

18 MR. BUNCE: About 2 hours total. So I anticipate
19 we'll be about 2 and a half hours or so left in our case.

20 THE COURT: So let's say we break at 12:30; we'll
21 come back at 1:30 and we'll get, you say 2 and a half
22 hours?

23 MR. BUNCE: Yes, Your Honor.

24 THE COURT: And you've got how many witnesses in
25 your case?

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1 MR. HENDRIX: I'm planning on calling three live
2 witnesses, Your Honor, and one of them hasn't even arrived
3 from Simpsonville and I was trying to see if we could
4 figure out to just let him come tomorrow and whenever you
5 say we're going to start in the afternoon. If you needed
6 me to try to get some witnesses, I can notify them now and
7 see if the other two or more local; one is in the
8 Batesburg/Leesville area and one should be down around
9 Cayce, South Carolina, which is 15 miles or something like
10 that.

11 THE COURT: How long will their testimony be?

12 MR. HENDRIX: I don't think it would be that long.
13 I don't think either one of them would be that long.

14 THE COURT: And that means 30 minutes or what; I
15 know it's hard to say.

16 MR. HENDRIX: 30 minutes give or take each.

17 THE COURT: I'm not going to hold you to it --

18 MR. HENDRIX: I understand. I don't think if we
19 did them tomorrow, I don't think that any of mine are going
20 take that long. I think that we should clearly be able
21 to -- depending on what time we get started tomorrow
22 afternoon, I think we should be able to finish my witnesses
23 tomorrow afternoon and I don't know what time it would be.
24 I know they've made some suggestions to judges about don't
25 give a case to the jury after X, but --

Stephen Fournier - Direct Examination Continued by Mr. Bunce

1 THE COURT: So if we started at 1:00 tomorrow, you,
2 you would be through by when, Mr. Hendrix?

3 MR. HENDRIX: I believe by, if we started at 1:00,
4 it depends on how many breaks we may take in the meantime,
5 I would believe we ought to be through by 3:00.

6 THE COURT: Okay. So we could do the arguing and
7 charging.

8 Well why -- could you ask just one of your
9 witnesses to come this afternoon or --

10 MR. HENDRIX: Okay. I --

11 THE COURT: -- if we get, maybe we ought to just
12 check around 2:30 or 3:00 and see where we are. But maybe
13 if you got one that's nearby, we could squeeze one in.
14 That might be enough to give us some breathing room
15 tomorrow.

16 MR. HENDRIX: Okay. Well let -- all right. Let me
17 see if I can --

18 THE COURT: All right. Well, okay. Everybody
19 we'll just take about a five minute break and we'll come
20 back and have the cross examination.

21 (A brief recess was observed.)

22 (The jury entered the courtroom at 12:04 p.m.)

23 THE COURT: All right. Cross examination, Mr.
24 Hendrix?

25 MR. HENDRIX: If it please, Your Honor.

00148

CROSS-EXAMINATION

BY MR. HENDRIX:

Q I guess it's good afternoon, Mr. Fournier, how you doing?

A Good afternoon, sir.

Q It's my understanding that you don't actually know what caused the machine, the -- the front-end loader that was being used as you described it as a rough terrain forklift, you don't know what caused that to have the -- all the pressure taken off the forks or partially taken off the forks of the lifting device, do you?

A I do not, no.

Q And you don't really know what kind of training Mr. Hogan received while working at Corder and Sons, do you?

A I think I know that -- basically my understanding from -- from -- from the testimony that I reviewed is that -- that he was basically told to use that jack stand or that -- that axle as a means of support and that's the basically the level of training that he was given regarding that particular operation.

Q But you don't -- the person that actually trained him, you've never seen a deposition and I think he said that was initially Robert Corder, or Bubba and you've never seen a deposition of his, have you?

A I have not, no.

00149

Stephen Fournier - Cross-Examination by Mr. Hendrix

1 Q Okay. So you don't actually know the level of
2 training that he would have gotten?

3 A I do not other than the fact that I do know is the
4 procedure that -- that was utilized in my opinion was
5 unsafe. So --

6 Q I understand. I understand. Let me go ahead and
7 deal with this. You get paid to testify in cases like
8 this, do you not?

9 A We're paid by the time that we spend on the case,
10 yes.

11 Q How much, how do; is that by the hour?

12 A Yes.

13 Q What is your hourly rate?

14 A My company charges \$375 an hour.

15 Q Okay. And I guess that means that Mr. Fournier
16 doesn't get all the \$375, that he gets some portion of it
17 hopefully; is that correct?

18 A I get my normal salary.

19 Q Okay. Let me ask you this. There was a some
20 discussion with a prior witness -- and I believe you were
21 probably in the courtroom -- about there was something like
22 grease seen maybe dribbling out or something along this
23 area where the -- the yellow thing is -- with the black and
24 there's a silver thing that goes forward; do you see that?
25 What I'm talking about? The yellow thing that comes

00150

1 forward and the silver thing that attaches to the yellow
2 lifting arm, I've been calling it?

3 A Yes.

4 Q That silver thing would be lubricated with
5 something, wouldn't it?

6 A Typically yes, there would -- in -- in -- in my
7 experiences there is essentially some grease fittings in
8 here that, that would basically provide some machine of --
9 of grease on that --

10 Q And I want to be sure, along this right in here?

11 A That's correct.

12 Q Okay.

13 MR. HENDRIX: With Your Honor's permission.

14 (Mr. Hendrix was showing the jury a picture.)

15 BY MR. HENDRIX:

16 Q That would be common to have grease seen in that
17 area, wouldn't it?

18 A It would be common to see grease in the area, but
19 it would not be common to see anything dripping
20 necessarily, but it would be common to see grease.

21 Q But at what level would you determine dripping if
22 it was described as grease that would be expected?

23 A That would be expected on -- on equipment in that
24 location, yes.

25 Q Okay. You don't claim to be an expert about these

Stephen Fournier - Cross-Examination by Mr. Hendrix

1 Caterpillar front-end loaders, do you; you're not saying
2 that you're an expert on those?

3 A No, I mean we've used construction equipment.
4 We've used, you know, front-end loaders like that on -- on
5 construction sites and I know how to use them safely.

6 Q Okay. Now, you weren't here yesterday, but Mr.
7 Hogan testified that he's worked construction and he's
8 operated heavy equipment and was -- was capable or had the
9 know-how to operate this piece of equipment. So you don't
10 have any reason to doubt that, do you?

11 A I do not.

12 Q And would you expect that somewhere along the line,
13 he would have had some training in how to safely operate
14 these; he should have, shouldn't he?

15 A Yes.

16 Q Whether it was from Mr. Corder or some of his prior
17 jobs, he should have gotten it?

18 A From one of his employers, yes.

19 Q Okay. And as you sit here today, you don't know
20 that he did not receive such training, do you?

21 A That's correct.

22 Q All right. Now with that -- having said that,
23 would that mean that Mr. Hogan would probably know just as
24 you described, that, you know, working under a suspended
25 load can be dangerous; you'd expect him to know that,

00152

Stephen Fournier - Cross-Examination by Mr. Hendrix

1 wouldn't you?

2 A Don't know if that material was included in the
3 operations manual and that was part of his training. I
4 wouldn't expect him to know it if it wasn't part of his
5 training, may not.

6 Q Well, let me ask you this. You -- if -- if you
7 assume for the sake of this question that the front-end
8 loader was in good working order, you don't have any
9 criticism of using it with the forks for the purpose of
10 lifting an automobile in and of itself, do you?

11 A Lifting in and of itself, no.

12 Q And it should be capable of lifting and holding
13 that load, should it not?

14 A Yes.

15 Q So that's one system right there of making sure
16 that it doesn't fall is the equipment itself should be able
17 to hold it up and I understand what you mean about having a
18 secondary system; I understand that, but that's one system
19 of keeping it off any worker that gets part of his body
20 underneath there is the machine itself is capable of
21 holding that kind of load off of the ground suspended?

22 A It's supposed to.

23 Q Yes. And you don't have any idea what would have
24 caused the machine to have the forks tilted and the lifting
25 arms -- tell me what they're called; I've been calling them

Stephen Fournier - Cross-Examination by Mr. Hendrix

1 that and I know that's not right; that's these yellow
2 things --

3 MR. HENDRIX: This is Plaintiff's Exhibit 9, Your
4 Honor, that we're referring to.

5 BY MR. HENDRIX:

6 Q These things that go like that and out then the
7 forks are attached on the end of them, what are they
8 called?

9 A The lifting arms or booms.

10 Q Lifting arms are good with me if it's good with
11 you. That if the lifting arms are up and stay up, then you
12 don't know what would have caused the forks to tilt down,
13 do you?

14 A I believe there's another, there's another set of
15 hydraulics for the forks themselves.

16 Q Okay. But you're not an expert and you're not that
17 sure about all that, are you?

18 A Well when I look at that picture, I think there's
19 something on there that -- that has a hydraulic cylinder
20 that -- that -- that operates the tilting angle of the
21 forks.

22 Q Okay. Do you know if they're completely separate
23 hydraulic systems or they just happened to be just enough
24 pumps and things there to operate both things?

25 A Different controls and a different control would

00154

1 operate the -- the tilt of the fork as opposed to --

2 Q The different controls mean that you could have the
3 load suspended and somebody could use the other lever and
4 it was Mr. Hogan who set it up, it would be him, to cause
5 the tilt, on the tilt of the forks that's holding the load;
6 is that correct?

7 A That's correct.

8 Q And when you gave your example using the cup and
9 I'll tell you what, I'll use one of mine for the second
10 load. When you gave the example of the forks tilting, that
11 would be more likely to happen if something was applying
12 the force from the forks to tilt it than just the dead
13 weight sitting on it; is that correct?

14 A It would depend, I mean you basically, in -- in
15 the -- in the application that we're talking about, you've
16 got the weight of the entire vehicle outboard of the --
17 the -- the axle stand. So you've got that force applied
18 and then -- then the only resisting force you would have
19 would effectively be the hydraulics.

20 Q All right. Now I think you had some, you talked
21 about the fact of some criticism if the -- and again
22 referring to Plaintiff's Exhibit 9, if the mobile home
23 axle, which was used as the secondary safety device to help
24 hold this up in case there was a problem, you had some
25 criticism if it was placed up under the fork on the end

Stephen Fournier - Cross-Examination by Mr. Hendrix

1 closest to the machine; is that correct?

2 A I did, yes.

3 Q And I think you would say that it would be better
4 if it was put out towards the end of the fork; is that
5 correct?

6 A That's correct.

7 Q And would putting it out maybe about a foot or so
8 give or take from the end of the fork, does that sound
9 reasonable?

10 A It -- it would depend upon where the vehicle is and
11 so forth. More than likely at the end of the fork -- and
12 in that application you may need some kind of device to
13 tether it out or hold it in place to make sure that it
14 doesn't slip or move.

15 Q But that would be the better place to put it?

16 A From a -- from a -- from a support standpoint, load
17 location support standpoint, yes.

18 Q Okay.

19 A For a single support, which I would not recommend.

20 Q I understand you wouldn't recommend it.

21 Now you -- you don't know what the industry
22 standards for salvage yards back in the 70's when Mr.
23 Corder got in business -- you don't what those standards
24 are, do you?

25 A I do not.

00156

1 Q I believe you already answered this, but you have
2 not actually participated in the design or -- or
3 construction of a stabilization system or blocking or
4 rigging I think you referred to, cribbing maybe, system for
5 something used in this industry, have you?

6 A In this industry, no.

7 Q Okay. And as you sit here today, you don't, you
8 can't say -- Well, let me ask you this, based on the
9 evidence that you know, isn't it more likely or most likely
10 that Mr. Hogan was the operator who set the machine up
11 based on the information you have?

12 A Yes.

13 Q Okay.

14 MR. HENDRIX: I beg the Court's indulgence one
15 moment.

16 THE COURT: Yes, sir.

17 (There was a pause in the proceedings.)

18 BY MR. HENDRIX:

19 Q Since you're not exactly sure what sort of training
20 Mr. Hogan would have and has, if you have any criticism of
21 his training, you're having to assume that he didn't get
22 adequate training; is that correct?

23 A That would be correct and -- and -- and then -- and
24 part of that understanding is the fact that -- that the --
25 that the training included the setup that was being used at

Stephen Fournier - Cross-Examination by Mr. Hendrix

1 the time which is unsafe and that -- and that in order to
2 be trained properly, you need to be trained by a qualified,
3 competent person who would not set up something unsafe.

4 Q All right. And before this rigging or the use of
5 the -- of the axle, whatever system you would use as a
6 secondary system come into affect, there would have first
7 have to be something or someone who caused the weight of
8 the SUV or perhaps even the force of the forks to be
9 applied to the axle; is that correct, to the bracing
10 device, something would have to cause that to happen; is
11 that correct?

12 A Something, yes.

13 Q And you don't know what that was?

14 A I don't.

15 Q Okay. But the secondary device or the secondary
16 safety device would never come into play until the first
17 thing happened, that is the weight or the force of the fork
18 and by force I'm talking about the hydraulics being used to
19 of course push down on it; that would have to happen first?

20 A That's correct, but that's the reason you have the
21 secondary support is because something can happen and, and
22 before you put a person underneath a suspended load, that
23 support system, secondary support system, needs to be in
24 place in order for it to be safe and compliant.

25 Q I understand, but if a machine -- the loader was,

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Stephen Fournier - Redirect Examination by Mr. Bunce

1 was operating properly, then even though you would want the
2 secondary system to be doubly safe, this accident should
3 never have happened?

4 A With the secondary system in place, the accident
5 would not have happened.

6 Q Okay. And even if you didn't have the secondary
7 system in place, if the front-end loader was operating
8 properly and had the capacity to hold the load, then still
9 this accident would not have happened?

10 A It would because you would have had the person
11 underneath a suspended load without the secondary support.

12 Q If you had that, while it may be dangerous, this
13 accident would not have happened?

14 A But --

15 Q If the machine had held?

16 A If the machine had held, I guess it would not have
17 happened, but again, you don't put, that's the reason we
18 have all these standards and the reason we do things the
19 way we do them.

20 Q I see. Thank you.

21 MR. HENDRIX: Nothing further, Your Honor.

22 REDIRECT EXAMINATION

23 BY MR. BUNCE:

24 Q All right. So going over some of the things that
25 Mr. Hendrix brought up here, based on your understanding of

00159

Stephen Fournier - Redirect Examination by Mr. Bunce

1 what the procedure that -- that they had in place at Corder
2 and Son, did it appear that Mr. Hogan was following the
3 procedures he was taught?

4 A Yes.

5 Q The industry that you're applying these rigging
6 principals to, does it make a difference which industry
7 you're in?

8 A No, it -- you know -- the -- it -- the rigging is
9 rigging regardless of whether it's in the construction
10 industry, mobile home, you name it -- it's, you know,
11 rigging is rigging.

12 Q Okay. So if I wanted to hang up an airplane in a
13 restaurant, would rigging principals apply there?

14 A They would.

15 Q If I wanted to hang up something in a bowling
16 alley, would rigging principals apply there?

17 A They would.

18 Q Would they be the same principal?

19 A Yes.

20 Q Okay. The principals that you've looked at here,
21 the -- the standards apply also to how folks are trained;
22 is that correct?

23 A Yes.

24 Q All right. Does it speak at all to who is supposed
25 to train an employee? In other words, can you -- is there

00160

1 a card that people carry around that would be sufficient to
2 say I was trained enough at the last one -- the last job?

3 A Yeah, under ideal circumstances, there should be
4 documentation of training.

5 Q Okay.

6 A And you know cards, certification, things of that
7 nature. I'm a trained rigger -- I'm, you know -- I've
8 received OSHA 10 training, things of that nature.

9 Typically those kinds of, you know, cards are -- are given
10 to, to people who receive training by competent personnel
11 providing the training.

12 Q Okay. If you get an employee that says I've run
13 construction equipment before, is it reasonable to depend
14 on the former employer to have properly trained them?

15 A You can have a reasonableness, but typically what
16 would you then need is, is essentially enough observation
17 that you'd be satisfied that they demonstrated a level of
18 competency --

19 Q Okay.

20 A -- you know, with the machine.

21 Q In other words, test him out?

22 A Yeah.

23 Q Okay. Would you have to know what they were
24 trained in to be able to evaluate what -- whether they were
25 properly trained before?

Stephen Fournier - Redirect Examination by Mr. Bunce

1 A One more time please?

2 Q Would you, as an employer, as a new employer, would
3 you need to know what they had been trained before to be
4 able to properly determine if they had been properly
5 trained?

6 A Ideally, yes.

7 Q Okay. The question about this Exhibit 9 here where
8 the witness, Ms. Smith, testified she saw fluid coming
9 from. All right. And so she --

10 MR. HENDRIX: Objection, Your Honor, I believe his
11 characterization, I think she said she saw something
12 dripping.

13 THE COURT: All right. Well --

14 BY MR. BUNCE:

15 Q Something dripping. All right. And she indicated
16 here.

17 A This is the hydraulic cylinder that lifts up the
18 lift down and -- and this is in the extended position when
19 this lift down is lowered, this silver inside, the piston,
20 is pulled back in and there is a grease fitting in here,
21 but -- to slide, so there's grease here. I would not --
22 and based on my experience, I wouldn't see anything
23 dripping. There would basically be a sheen and you know,
24 and kind of a glaze, if you would on the, on the -- on the
25 steel cylinder, but I wouldn't expect to see anything

00162

Stephen Fournier - Redirect Examination by Mr. Bunce

1 dripping.

2 You also have hydraulic hoses in the area and you
3 know, if you're getting dripping, that's where I expect the
4 possible dripping to occur.

5 Q Okay. Mr. Hendrix asked you or I concede that you
6 don't know what caused the machine to take the pressure
7 off; is that correct?

8 A That's correct.

9 Q All right. Does it matter whether you know --
10 ultimately as far as the cause of Mr. Hogans injuries, does
11 it matter what caused the pressure to be taken off?

12 A No, that's the reason you have secondary support is
13 because things happen. Things can happen. Unforeseen
14 things can happen and that's the reason you have the
15 secondary support is in case something like that does
16 happen that we don't have a catastrophic event that causes
17 serious injury or death.

18 Q Okay. So after Mr. Hendrix's questions, what is
19 your opinion about the cause of Mr. Hogan's injury?

20 A The failure to provide secondary support underneath
21 that system was the cause of the incident.

22 Q And you do not consider a mobile home axle a
23 secondary, an adequate secondary support?

24 A That's correct.

25 Q All right.

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Stephen Fournier - Recross-Examination by Mr. Hendrix

1 MR. BUNCE: That's all the questions I have, Your
2 Honor.

3 MR. HENDRIX: Very briefly.

4 RECROSS-EXAMINATION

5 BY MR. HENDRIX:

6 Q As an engineer, you're saying you don't take into
7 account the fact that it's possible certainly that Mr.
8 Hogan, who set this up most probably, brought this on
9 himself? You're not considering that, are you? You're
10 focusing on the secondary system, whether it worked and
11 whether something might be better?

12 A I'm focusing on the process that was -- was being
13 utilized here was essentially working on an elevated
14 load -- an elevated load with a piece of equipment and in
15 order to do that safely, there has to be a secondary
16 support system in place. So I'm looking at the overall
17 process. If that process was performed in a safe and
18 compliant manner, that secondary support system would be in
19 place and regardless of what happened or what caused
20 something to move, that secondary support system would have
21 kept the load suspended and we wouldn't be here today.

22 Q And your criticism is that because the secondary
23 load -- load bearing system -- the axle, perhaps didn't
24 save Mr. Hogan from himself, that's what you're saying is
25 why we're here today?

00164

Stephen Fournier - Recross-Examination by Mr. Hendrix

1 A I'm saying that -- that -- that -- and I think
2 we've talked about it earlier, is that single axle was not,
3 in my mind, safe or appropriate either.

4 Q I understand. But if Mr. Hogan didn't set it up
5 correctly, that's not safe either, is it?

6 A That's correct.

7 Q Okay. And that would be a part of this whole
8 thing, wouldn't it?

9 A It could be a part of this whole thing, but again,
10 the, a proper secondary support was not implemented or
11 provided.

12 Q I understand. I understand. Thank you.

13 THE COURT: All right, sir, you may step down.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Thank you, Mr. Fournier.

16 All right. We'll go ahead and take a lunch break.

17 Just be back at 1:45 and we'll continue with the
18 presentation of evidence. Don't talk about the case and
19 continue to keep an open mind and just be back at 1:45.
20 Thank you.

21 (The jury left the courtroom at 12:28 p.m.)

22 THE COURT: Yes, sir?

23 MR. HENDRIX: For planning purposes and I hope this
24 is okay and I can adjust this if you need for me to. I've
25 asked Mr. Robert Corder if he can be here at three. If

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1 take a five minute break. Don't talk about the case and
2 continue to keep an open mind. Thank you.

3 (The jury left the courtroom at 2:28 p.m.)

4 (There was a brief recess.)

5 (The jury entered the courtroom at 2:38 p.m.)

6 THE COURT: All right. Yes, sir, Mr. Bunce.

7 MR. BUNCE: Your Honor, we're going to publish
8 the -- the other deposition of Dr. Karl Lozanne.

9 THE COURT: Okay.

10 (The deposition was started with the DVD playing.)

11 MR. BUNCE: Rather than push through the
12 technological issues. We'll read it in again from the
13 transcript.

14 We have the original?

15 THE COURT REPORTER: I don't have that one yet.

16 MR. BUNCE: You don't have it?

17 THE COURT REPORTER: I can mark it after you're
18 done.

19 (The deposition of Dr. Karl Lozanne Direct
20 Examination by Mr. Bunce read into the record by Mr. Bunce
21 and Mr. Marrin.

22 The deposition of Dr. Karl Lozanne
23 Cross-Examination by Mr. Hendrix read into the record by
24 Mr. Hendrix and Mr. Marrin.

25 The deposition of Dr. Karl Lozanne Redirect

00166

1 STATE OF SOUTH CAROLINA
2 COUNTY OF LEXINGTON COURT OF COMMON PLEAS
3 JERRY HOGAN,
4 Plaintiff,
5 vs. CASE NO. 13-CP-32-03076
6 CORDER & SONS, INC.,
7 Defendant.
8

COPY

9 VIDEO
10 DEPOSITION OF: KARL LOZANNE, MD
11 DATE: July 20, 2015
12 TIME: 3:55 P.M.
13 LOCATION: Offices of
14 Columbia Neurosurgical Associates
15 720 Rabon Road
Columbia, SC
16 TAKEN BY: Counsel for the Plaintiff
17 REPORTED BY: Leslie T. Stanley,
Certified Shorthand Reporter
18

VIDEOTAPE

19
20
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Page 1

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1 MR. HENDRIX: My name is Jon Hendrix,
2 and I represent Corder & Sons, Inc.

3 THE VIDEOGRAPHER: Would the court
4 reporter please swear in the witness, and we may
5 begin.

6 KARL LOZANNE, MD,
7 being first duly sworn, testified as follows:

8 EXAMINATION

9 BY MR. BUNCE:

10 Q. Sir, my name is Bradd Bunce, and I
11 represent Jerry Hogan in this case. Can you give
12 -- please give your full name for the record.

13 A. Karl Angelo Lozanne.

14 Q. Dr. Lozanne, you are a physician?

15 A. That's correct.

16 Q. What is your educational background,
17 sir?

18 A. Well, I've got an undergraduate degree
19 from Brown University, and I matriculated at Yale
20 School of Medicine, and after I graduated from
21 there, I matched a neurosurgery -- did my
22 neurosurgery residency seven years at the
23 University of Pittsburgh Medical Center; since that
24 time, I've become a board-certified neurosurgeon,
25 practicing in Columbia, South Carolina, and the

1 your opinions has not reached that level, could you
2 let me know, sir?

3 A. I will.

4 Q. Okay, thank you. When did you first
5 see Mr. Hogan?

6 A. All right, Mr. Hogan first presented to
7 our -- to a hospital that I service in February of
8 2011.

9 Q. And which hospital was that?

10 A. That's Lexington Medical Center.

11 Q. Okay. And so how did you come to be
12 involved in his care?

13 A. I was the neurosurgeon on call when he
14 presented to the emergency room, following an
15 injury.

16 Q. Okay. Do you recall what date you saw
17 him?

18 A. Let's take a look. He was evaluated on
19 February 18th, 2011.

20 Q. And so -- I wasn't sure if I caught
21 this, but did you see him in the emergency
22 department?

23 A. I cannot tell you directly whether it
24 was in the emergency department that I saw him or
25 if I saw him on the floor upstairs in the hospital.

1 I saw him in the hospital. 7

2 Q. Certainly. What were you informed
3 about his history?

4 A. Um, so apparently, he was a 46-year-old
5 who was working on a car, and the car ended up
6 falling on him, and he ended up presenting to the
7 hospital with a significant amount of discomfort in
8 his back, inability to void, and a CT scan of the
9 abdomen and pelvis were consistent with a burst
10 fracture, broken bones in his low back.

11 Q. For the jury's benefit, what is a burst
12 bone? What do you mean by that?

13 A. So a burst fracture, we categorized it
14 from fractures in the spine. A burst fracture is a
15 fracture in which -- if you can imagine the spine
16 being made up of bricks that sit one on top of each
17 other, that's each of your vertebrae.

18 A burst fracture is one in which the
19 break itself kind of collapses and bulges out, so
20 something hit it from the top, and it just broke,
21 and it kind of fell, broke, out.

22 Q. Okay. All right. And is -- is that
23 particular to a -- to a kind of force loading?

24 A. Yes, so this is -- yes, this is a type
25 of fracture that is associated with a force that

1 A. He was admitted on February 18th,
2 that's correct.

3 Q. Okay, and -- and you, in fact, did the
4 surgery, correct?

5 A. That is correct.

6 Q. And you did that on the 25th of
7 February?

8 A. Let me look at the exact date. Yes,
9 the surgery date was 2/25/2011.

10 Q. Okay. And so he -- what I'm getting at
11 here is, did he know that he -- for a couple of
12 days ahead of surgery, that he was going to be
13 facing the surgery?

14 A. Yes, most definitely. Nobody gets
15 taken to the operating room unless they know they
16 are going to have an operation.

17 Q. Okay. All right, then. And so you
18 mentioned that the surgery was going to require a
19 general surgeon. Was that Dr. Barwick?

20 A. That's correct.

21 Q. All right, so -- so he actually -- as I
22 understand it, he actually opened up Mr. Hogan; is
23 that correct?

24 A. That's correct.

25 Q. And opened the field for you to work

1 through?

2 A. Exactly.

3 Q. Okay. And when you -- when you took
4 over the surgery, what did you observe?

5 A. So we observed the fracture at the L1
6 vertebral body, and you know, the approach was
7 appropriate, one in which we actually moved the
8 lung forward.

9 He had the signs of trauma in that
10 area, meaning that there was blood around the areas
11 that -- that's around the spine, and he had a
12 compression fracture with a portion of his
13 fracture -- bone, because of the burst, cutting
14 anteriorly, and some posteriorly as well.

15 Q. So what did you have to do to repair
16 that?

17 A. So the biggest thing is to stabilize
18 the spine. In other words, he was having a lot of
19 discomfort, because it hurts, because that bone was
20 no longer able to carry on its function of, you
21 know, holding the rest of the spine up, so we
22 actually resect as much bone as we can actually
23 resect through that incision, and in its place, we
24 put in what's called an intervertebral device, and
25 then we -- we add an anterior -- it's called a

1 Q. And how did that turn out?

2 A. Let's see. It showed some subsidence
3 of the cage into the L2 vertebral body, and what
4 that means is that the device that we put in
5 between the other two bones, the device itself
6 ended up kind of sinking down into the bone below
7 it, so the bone below just simply didn't hold it,
8 and that was concerning, and there was -- because
9 of the subsidence and some of the bone that had
10 retro pulse, it was some degree of compression or
11 stenosis in his lumbar spine.

12 Q. Compression of what?

13 A. The nerves.

14 Q. And did that cause you concern?

15 A. Yes, it became -- it's a concern,
16 especially because of the symptoms that he
17 developed. He started -- during his visit, he
18 complained now of some discomfort going towards his
19 legs, so discomfort towards the legs is always
20 evaluated to determine whether it's any pressure on
21 the nerves itself.

22 The CT myelogram showed some subsidence
23 of the cage, and now he's having symptoms, and
24 there's some stenosis on the nerves, so yes, that
25 is a concern.

1 Q. Okay. So -- so the CT myelogram, it
2 showed the reason for the -- for the problems he
3 was having in his legs?

4 A. That's correct.

5 Q. Okay, so what was the -- what was your
6 recommendation, as far as what he could do about
7 that?

8 A. So I recommended to him that now we
9 needed to relieve the pressure on the nerves and
10 supplement his thoracoabdominal procedure with a
11 posterior procedure. What I mean by that is, his
12 bone was not able to sustain the cage that was put
13 into the side.

14 In that situation, we do what's called
15 a pedicle screw fusion from the back. All right,
16 so two things; one is to relieve the pressure on
17 the nerves, the compression, and the second is to
18 supplement or stabilize or add additional structure
19 to his spine, so it doesn't continue to collapse,
20 and that's the pedicle screw instrumentation.

21 Q. And so -- so when you say posterior,
22 you mean in the -- the back back?

23 A. The incision in the back back, exactly.

24 Q. And -- all right. And so did you
25 actually do that surgery?

1 A. Yes.

2 Q. Okay.

3 A. We did, and he was taken back for that
4 surgery on May 16th, 2011.

5 Q. Okay, now, again, before the surgery,
6 did you have to discuss the potential benefits and
7 risks of this with him?

8 A. Every time, that's correct.

9 Q. All right, were there any different
10 risks for this surgery versus the first time you
11 discussed it with him?

12 A. Very similar risks, except that, you
13 know, we don't have to bring down the lung; in
14 particular, this one is a procedure that's done
15 through the back, so we don't actually expose the
16 chest cavity.

17 The risks of this procedure, still the
18 general risks of any surgery, infection, blood
19 loss, potential injury to any structures in the
20 vicinity, which includes the nerves and the spinal
21 cord itself. There's also a risk of what's called
22 a cerebrospinal fluid leak.

23 The additional risk is that now I need
24 to put screws and rods in the back, so this is
25 instrumentation like we had instrumentation in the

1 about it. Doctor, Mr. Hogan claims that a vehicle
2 fell from what was essentially a forklift onto him,
3 and the Defendant acknowledges that Mr. Hogan was
4 at his workplace, but he seems to indicate that
5 Mr. Hogan faked the injury or somehow was injured
6 somewhere else or not injured that day or was
7 already injured when he came to work that day.

8 A. Uh-huh.

9 Q. Considering all the known facts, could
10 Mr. Hogan reasonably have been working for an
11 entire morning with the injuries that you saw?

12 A. I think it would be highly unlikely,
13 with the kind of fracture that he had that -- that
14 he sustained it in -- that it wouldn't have been
15 noticed.

16 Q. Is there any way for Mr. Hogan to
17 somehow fake the injuries that you saw?

18 A. No, his bones -- his bones were broken.

19 Q. These -- the injuries that you saw, are
20 they consistent with an item striking -- a heavy
21 object striking Mr. Hogan?

22 A. It's consistent with a trauma, most
23 definitely.

24 Q. All right. And from what you know of
25 it, would -- do you have an opinion as to what

1 caused his injuries?

2 A. According to the record, in terms of
3 when he came in, he had a car land on him, okay?
4 And it's -- his injury was consistent with a car
5 landing on him.

6 Q. All right. Is there anything about his
7 injuries that wasn't consistent with that?

8 A. No.

9 Q. And is it more likely than not the
10 injuries he suffered on February the 18th required
11 him to have surgery?

12 A. Yes, his whole clinical course is
13 directly related to the injury with which he
14 presented on February 18th of 2011.

15 Q. All right, then, Dr. Lozanne, have all
16 the opinions that you have given today, have they
17 been to a reasonable degree of medical certainty?

18 A. Yes.

19 Q. Is there anything about your opinions
20 or anything you'd like to change today?

21 A. Nothing.

22 Q. All right.

23 MR. BUNCE: Thank you, that's all the
24 questions I have.

25 EXAMINATION

1 keep an open mind. All right. Thank you. Have a good
2 night.

3 (The jury left the courtroom at 4:26 p.m.)

4 THE COURT: Do y'all want to go ahead and do the --
5 was that your last witness or do you --

6 MR. BUNCE: Yes, Your Honor, I just want to make
7 sure everything is in evidence that needed to be.

8 THE COURT: Okay. You want to go ahead and do your
9 motions while we're here so we want have to do that
10 tomorrow?

11 MR. HENDRIX: Sure. I assume you don't have any.

12 MR. BUNCE: I do not.

13 MID-TRIAL MOTIONS

14 MR. HENDRIX: Your Honor, we would move at this
15 time for a directed verdict of nonsuit against the
16 plaintiff on the grounds that the evidence taken as a
17 whole, even in the light most favorable to the plaintiff,
18 is capable of only one reasonable conclusion and that is
19 that the plaintiff is more than 50 percent at fault in
20 causing this accident. And that -- factored into this --
21 and I don't know if this should be separate or kind of all
22 argued together, is that basically part -- we believe that
23 part of their theory is that essentially res ipsa loquitur
24 should be involved and since this happened, therefore,
25 something must be wrong and we think when you look at all

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1 that combined, the fact that such res ipsa loquitur has
2 never been recognized by this State and that there is
3 evidence that -- from Mr. Corder, who was called as their
4 witness, from Natasha Smith and even from Mr. Fournier, the
5 expert, that most likely, Mr. Hogan set this machine up and
6 that there is no other evidence other than speculation of a
7 machine failure that the setup is probably what caused the
8 machine to fail and that, therefore, we don't see -- we
9 don't believe that there can be any reasonable conclusion
10 other than that Mr. Hogan and no one else by more than 50
11 percent caused this accident.

12 If -- and as a part of that -- excuse me, I'm
13 sorry. Unless you want to stand? I don't think the Judge
14 will mind if your legs are giving you trouble.

15 (Mr. Corder, the defendant stood up due to health
16 issues.)

17 THE COURT: No, that's okay.

18 MR. HENDRIX: Is it okay if he stands?

19 THE COURT: Yes, sir.

20 MR. HENDRIX: Okay. As a part of all that, we just
21 think that taking all that evidence into account, that even
22 if there was some negligence on the part of Corder and Sons
23 in not having a better or different system, that that would
24 not equal 50 or 51 percent and that, therefore, we should
25 be entitled to a directed verdict of nonsuit against the

1 plaintiff's case at this time and should not have to
2 present any evidence.

3 THE COURT: Okay. Thank you, Mr. Hendrix.

4 Yes, sir.

5 MR. BUNCE: Well certainly, Your Honor, while there
6 is some evidence that the plaintiff took certain actions
7 out there. There's also been testimony which should be
8 given the light most favorable to him that he was simply
9 following the instructions provided by the defendant and
10 using the tools provided by the defendant and there's also
11 Mr. Fournier's testimony that essentially the cause of this
12 is not -- is not the terminal event. The cause of this is
13 the failure to provide an adequate system and adequate --
14 and adequate and safe equipment to work with. And looking
15 ahead towards what the statute requires, Your Honor, that
16 which would be the negligence per se here that the
17 employer's required to provide a work place that's
18 reasonably free of recognized hazards, which would cause
19 injury and that's the cause and issue here. And so, Your
20 Honor, we believe we've certainly met the standard and
21 defeat that motion, Your Honor.

22 MR. HENDRIX: Your Honor, if I could give one thing
23 in reply to that.

24 THE COURT: Yes, sir, certainly.

25 MR. HENDRIX: Is that, you know, Mr. Hogan denied

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1 whatsoever that he had anything to do with operating the
2 machine even though there's some pretty substantial other
3 evidence that, in fact, he did. And we just submit that
4 they shouldn't be allowed to have it both ways. I'm going
5 kinda borrow from the federal system that there's --
6 there's a theory in the federal system that if a -- if a
7 witness testifies and there's ample opportunity to
8 cross-examine, do all that and straighten out any issues,
9 then they shouldn't be allowed to come in later with
10 something else to try to defeat summary judgment. Well
11 kind of the same thing here. I don't think he ought to be
12 allowed to have it both ways. If he operated the machine
13 and caused this to come down, I think he's got to face the
14 music to that and that -- that the expert's opinion, Mr.
15 Fournier's opinion is just that, an opinion, but that
16 shouldn't -- that's not the legal cause. That's his
17 opinion as to a cause or contributing cause of the accident
18 and we can say a lot of things.

19 If Mr. -- if Mr. Hogan hadn't come into work that
20 day, we wouldn't be here. That may well be true, but
21 that -- does that, you know, that's the thing; what's the
22 cause of the accident and we think that the cause of the
23 accident in the improper setup, that the evidence is really
24 almost, I think in a criminal case, they'd call it
25 overwhelming, that he's the one that set it up, that it

1 failed not because there's any evidence of a -- really any
2 evidence of a machine failure; it's a failure because of a
3 setup failure and there is testimony that this machine had
4 never failed like that before.

5 And when I say machine, I'm including the post,
6 despite what the expert said. We just think under the
7 circumstances we should be inclined to a directed verdict
8 and nonsuit.

9 THE COURT: Thank you, sir.

10 MR. BUNCE: And to the extent, I did address it
11 earlier, that the plaintiff is not trying to have it two
12 different ways in this regard; with regard to whether or
13 not he was the person who set up the machinery there.
14 Certainly he was the person holding the axle when it was
15 set there; he admits that much and -- but again, it's --
16 it's -- it's -- he's following the employer's plan. And so
17 it's that he's -- an issue of him defeating a safety plan,
18 a different safety plan they set up where it would be
19 contributory, but here he's doing exactly what he was told
20 to do.

21 And then as far as res ipsa, certainly there's no
22 res ipsa in South Carolina, but we -- we recognize that
23 essentially circumstantial evidence gets us to the same
24 point. And so circumstantial evidence is such that there's
25 been testimony about a potential hydraulic leak. There's

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1 been testimony that -- that this could have happened in
2 other ways do to the loading, the way it was set up even
3 following the instructions that he was given. So there's a
4 number of different ways that this can provide and
5 certainly he was not in a position outside of there to look
6 out and see what exactly happened.

7 He's never going to be able to provide that
8 testimony and that's not the burden on him, Your Honor,
9 it's simply to provide testimony for which the jury can
10 infer it.

11 MR. HENDRIX: They can't from speculation, Your
12 Honor, and that's what we think that. All this stuff about
13 a hydraulic blah, blah, blah. If you consider the
14 testimony and what was actually said, including Natasha
15 Smith that she did -- any -- if there was any discussion of
16 a hydraulic leak, it could have been about something other
17 than the -- the loader and the mom saw something dripping
18 that she described as grease from exactly where the grease,
19 not hydraulic fluid, would be expected to come from.

20 We just think there's no evidence there whatsoever
21 to base it on that and we just think that we should be
22 entitled to a directed verdict of nonsuit.

23 THE COURT: So what's your view, Mr. Hendrix, on
24 Mr. Fournier's opinion as to why the secondary safety
25 mechanism was needed in this particular case?

1 MR. HENDRIX: I'm sorry, can you repeat that, the
2 first part of that.

3 THE COURT: Well, I guess what I'm asking you is
4 what's your view of Mr. Fournier's testimony again as you
5 acknowledged, having viewed it in the light most favorable
6 to Mr. Hogan, Mr. Fournier's opinion about the hydraulic.
7 In other words, as I understood his testimony, his opinion
8 was that the cause of the accident was inadequate secondary
9 safety in place. There should have been better secondary
10 backup safety.

11 So why -- why did we need it in this case; you're
12 saying there's no evidence other than speculation that the
13 initial safety feature failed.

14 MR. HENDRIX: Well, I don't know that we did the --
15 because there's no indication that the first one -- the
16 first system failed, quote, unquote, and if Mr. Hogan did
17 something to cause it to give way, then, you know, you can
18 defeat anything. And I -- and I hate to sound crass
19 because I actually on a personal level, like Mr. Fournier.
20 I had an occasion to run into him somewhere and shot the
21 breeze a little bit with him otherwise, but he was -- that
22 testimony was what he was paid to say and I actually think
23 that it is just that, an opinion as opposed to evidence.
24 And I don't know that his opinion in and of itself without
25 other evidence is sufficient to base it on.

1 I'll say it again, I think his opinion is based on
2 some speculation because I don't think it's enough. You
3 can always say that something better could be done and that
4 is not the standard that we have to look at and I do think
5 that's essentially what he's saying in this case is you
6 could have done more, even though it had never failed; I'm
7 remembering the best I can what Mr. -- because we haven't
8 had any other testimony, remembering what Mr. Corder said.

9 You could, in the light of the testimony that he's
10 never had any failure like this or given way before, that
11 it gave way this time with absolutely no explanation of why
12 the machine, which is admittedly capable of holding it and
13 not giving way, why that didn't prevent the accident from
14 happening, which reluctantly Mr. Fournier admitted, yes, if
15 it didn't have a defect, it would have held it up; we
16 wouldn't be here.

17 He was reluctant in doing it and like I say, you
18 can always argue there's something more, but I don't know
19 that that really constitutes evidence that, that there was
20 negligence on the part of Coder and Sons because they
21 didn't do more. I think there's been some indication of
22 what's reasonable and we believe that they recognized
23 before all this took place that well, it's a good idea to
24 have something under there and they had something under
25 there that would hold it. And the testimony thus far has

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1 been, and I expect it to continue if we have to go forward,
2 but hopefully we won't, that -- that this was adequate to
3 hold it, there's never been any wobbliness or anything like
4 that. This was adequate and even Mr. Fournier said as far
5 as the compression strength of the axle, he had no problem
6 with that, at least that's what I recall him saying.

7 So under all the circumstances, did they act
8 reasonably? We think the inescapable conclusion is they
9 did. You know, with hindsight, could maybe something have
10 been done more to protect Mr. Hogan from himself; possibly
11 that's the case, but that's not what we have to -- that's
12 not what should be looked at in the courtroom.

13 I hope I answered the question. If not, if you
14 redirect me, I'll try to.

15 THE COURT: Well, no. I mean, I think everything
16 you said is relevant and interesting. I'm just curious as
17 to why -- I'm not really articulating it precise enough or
18 understanding properly. But I guess my question is,
19 what -- what relevance is this testimony about hydraulic
20 and leak; in fact, I think there's testimony this morning
21 from one of the ladies about someone talking about a leak
22 and then that she saw something on the booms that was
23 indicative of a leak or appeared to be consistent with a
24 leaking -- a leak of fluid. So --

25 MR. HENDRIX: I think she described it as grease

1 when asked, it looked like grease.

2 THE COURT: Okay.

3 MR. HENDRIX: And the testimony since then,
4 including from Mr. Fournier was, that's where you would
5 expect grease to be.

6 THE COURT: Right. Okay. I understand that, but I
7 mean, again, we're looking at it most favorable to the
8 plaintiff. But I'm going back to my original question and
9 not very artfully, but does there have to be evidence
10 sufficient to -- from which the jury can infer that the
11 first line of defense to keep this truck from falling
12 failed and that failure was due to the negligence of the
13 defendant?

14 MR. HENDRIX: I think that the burden is on the
15 plaintiff of proving his case. I think that that is
16 something that they do have to, I believe they have to
17 address it. I kind of would analogize this to medical
18 malpractice. You know we're in a situation here and you've
19 got no explanation for why it happened, then the fact that
20 there's a bad result doesn't mean that there's malpractice.
21 Well the same thing here is they had a, you know -- what
22 caused the initial system to fail? If the plaintiff caused
23 the initial system to fail and otherwise it should have
24 been adequate to keep the load from falling, then he's got
25 some substantial part to play in the cause of this accident

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1 despite the opinion of -- of the expert, Mr. Fournier.

2 And I do think they have to address that and they
3 have not. They've got nobody whose testified for them has
4 got any idea or any explanation as to how or why this
5 failed and there's been no evidence to the contrary of what
6 Mr. Corder testified that it worked -- if I use the word
7 perfectly, that may be overstatement, but it worked great
8 beforehand. It worked great the next day when the son came
9 to move it. It hasn't given any problems since then. So
10 you know, it would be speculation, pure and simple, to
11 allow, the jury would have to speculate to find that a
12 hydraulic leak contributed to this or that something other
13 than Mr. Hogan causing this failure and by his own
14 admission, he set the thing up so if it was improperly set
15 up, the axle to hold it, that would be on him and really
16 the evidence is that most probably, he's the one that set
17 it up and it was set up improperly and that that's what
18 caused the thing to happen. The fact that there might
19 could have been more done in and of itself, doesn't get
20 around that and we submit that doesn't mean that you just
21 ignore all that, all the other negligence because possibly
22 more could be done.

23 I suppose more can be done in every situation,
24 but--

25 THE COURT: But what was the import of Mr.

1 Fournier's expert testimony about the ANSI standards; I
2 mean, can you address that?

3 MR. BUNCE: Certainly, Your Honor. I believe that
4 the issue, and it depends on where you see the negligence
5 and that was Mr. Fournier's testimony is that the
6 negligence happened when the whole procedure was designed.
7 Mr. -- Mr. Hogan, our position is that yes, he did set this
8 up improperly because he was taught to set it up
9 improperly. The whole procedure was faulty. Using an axle
10 as a support mechanism is totally inadequate and that was
11 Mr. Fournier's testimony.

12 THE COURT: Well, did he say about the ANSI
13 Standards and the rough terrain forklift operation
14 specifically. Just refresh my memory; he tied it to a
15 specific standard and I --

16 MR. BUNCE: One of the ANSI standards was that
17 you're not to work under -- under a suspended load without
18 adequate --

19 THE COURT: Okay.

20 MR. BUNCE: -- and that is the standard which we
21 tied this all to.

22 THE COURT: Okay.

23 MR. BUNCE: That is the failure here. There was
24 a -- there was a standard -- there was a standard about
25 blocking and how that should be done.

1 THE COURT: Yes.

2 MR. BUNCE: There were rigging issues with regard
3 to, I'm sorry, there was an ANSI standard that had to do
4 with the qualifications of persons who can design rigging
5 and what -- and who is qualified to set up a rigging
6 operation.

7 THE COURT: He said you had to have two points of
8 support.

9 MR. BUNCE: Two points of support.

10 THE COURT: And you had to have a secondary, and
11 that includes a secondary blocking and safety mechanism;
12 the defendant didn't do that and that caused the accident;
13 that's -- I mean, my notes are certainly fallible, but
14 that's essentially --

15 MR. HENDRIX: Your Honor, I think he said that, but
16 I think the opposition is that's his opinion.

17 THE COURT: Yeah.

18 MR. HENDRIX: That didn't come directly from an
19 ANSI standard as I recall.

20 THE COURT: All right. Well, okay. I guess what
21 I'm struggling with, I -- there was a case a while back
22 that involved a hospital where a lady came in to visit a
23 patient, there was a painting in the room, the lady sat
24 down underneath the painting, the painting fell off the
25 wall and hit her in the head and caused damage and the

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1 Court of Appeals, it's unpublished, said that that should
2 not have gone to the jury because it was a res ipsa. There
3 was no evidence about what caused the painting to fall.

4 How is this case different?

5 MR. BUNCE: Well, sir, the -- there was testimony
6 about what could have caused the vehicle to fall. That the
7 situation of loading, the demonstration he gave about
8 how -- how it would have -- if the forks were tilted, how
9 that could have done that. The -- the -- the conclusion
10 that one has to reach here if -- if they are to believe
11 that Mr. Hogan was holding and set up the brace and he was
12 running a machine, is that he would not be able to see what
13 was happening there. The procedure that he was taught to
14 use -- to use that single brace, was faulty and -- and the,
15 that is the -- that is where the failure happened here,
16 Your Honor.

17 The -- and I'm sorry, I'm trying -- trying to
18 tangle it out here, but the -- I believe simply it's a
19 matter of focus on where the problem is and that -- and
20 that essentially it -- this is different. That is not just
21 speculation alone. There was testimony from Mr. Hogan that
22 the -- the SUV was rocking before it fell. And so that
23 combined with it -- that combined with it show that the
24 process that he followed -- and all the testimony that has
25 been in is that he has followed the procedure that he was

1 taught. And so that procedure led to a situation where the
2 SUV was actually able to rock while he was working on it.
3 It was inadequate because of the points -- of the failure
4 to block at two different points.

5 THE COURT: Okay.

6 MR. HENDRIX: Now, Your Honor, I don't think that
7 there was any ANSI standard or anything like that that says
8 that kind of thing is mandated. What you've got to do is
9 to have it reasonably unlikely to fall. From the
10 experience of these folks over many years -- maybe now -- I
11 don't know how long they've been using, I don't think we
12 got an exact date on this piece of equipment, the axle, but
13 for many, many years it's been used with absolutely no
14 problem. I do think that your point is well taken. I have
15 not seen the unpublished case that you referred to, but I
16 do think it is extremely similar in that what they're
17 saying, we don't know what caused it to fail, what caused
18 this thing to fail now, but it failed; therefore, more
19 could have been done and -- therefore, they're at fault in
20 causing this accident. Well that's just not the way --
21 that's not the legal cause of the accident we submit and
22 what might have caused the -- the initial system to give
23 way to start with is based -- would have to be based on
24 pure speculation because I directly asked Mr. Fournier, you
25 don't know what caused it to fail, do you. And he said, I

1 don't know. And he said that in his deposition and he said
2 it again today. So I mean he just doesn't know. They've
3 got utterly and absolutely no explanation for it, which I
4 submit to you is the same as saying in the case you
5 referred to, we don't know what caused the picture to fall,
6 but just once it fell, they should have had some wood under
7 it or a frame built around it and maybe cables coming down
8 from the ceiling.

9 Well, apparently the Court of Appeals decided all
10 that wasn't necessary and I'm telling you that we think
11 it's very, very, similar here. So similar that we're going
12 to ask Your Honor to dismiss the case on a nonsuit.

13 THE COURT: Okay. Well. I'm going to think it
14 over during the recess. I do see some differences, but
15 I'll have to let it set a little bit in my feeble mind over
16 night. So we'll reconvene at 11:00 tomorrow. Thank you.

17 MR. HENDRIX: Your Honor, you wouldn't happen to
18 remember how long ago that case was, would you, the
19 unpublished one.

20 THE COURT: Mr. Hendrix, the only reason I remember
21 it is because I got reversed and you know what they say;
22 it's the bit dog that barks.

23 MR. HENDRIX: Oh yes. We're going to give you an
24 opportunity -- I was kidding, Your Honor.

25 THE COURT: I'll find it somewhere. It hasn't been

1 that long.

2 MR. HENDRIX: Okay.

3 THE COURT: Maybe within the last year.

4 MR. HENDRIX: Thank you, Your Honor.

5 THE COURT: Thank you.

6 (Court was in recess for the day.)

7 WEDNESDAY, JANUARY 6, 2016

8 THE COURT: I apologize for the delay. The matters
9 that I had to attend to in Columbia took much longer than I
10 anticipated. I'm sorry to inconvenience everybody. It was
11 out of my control.

12 We were arguing a directed verdict motion yesterday
13 afternoon and I'm going to deny the motion. I find that in
14 the light most favorable to the plaintiff in viewing all
15 the inferences and ambiguities in the plaintiff's favor
16 that there is sufficient evidence to send the case to the
17 jury on a negligence theory. Unlike the picture frame, the
18 picture case, here the defendant, through Mr. Corder's
19 testimony and Mr. Hogan's testimony, established that they
20 foresaw they needed a backup safety device to keep the
21 vehicles from falling on workers. So they had that in
22 place.

23 The opinion of the expert was that the plan they
24 had in place was not sufficient and not reasonable and was
25 the cause of the accident. So I think they have satisfied

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1 the elements of negligence if the jury believes it, but I
2 can't weigh the credibility of the testimony, I'm just
3 determining whether it exists and I find it does.

4 All right. Anything further before I bring the
5 jury in?

6 MR. BUNCE: Nothing from the plaintiff, Your Honor.

7 MR. HENDRIX: Nothing from the defendant, Your
8 Honor.

9 THE COURT: Okay. And you're -- you want to rest
10 in front of the jury and then turn it over to Mr. Hendrix?

11 MR. BUNCE: Yes, sir, Your Honor.

12 THE COURT: Okay. Yes, sir.

13 (The jury entered the courtroom at 1:05 p.m.)

14 THE COURT: Okay. Ladies and gentlemen, I
15 apologize for inconveniencing everyone. I had a matter in
16 Columbia that I had to attend to and it's been set for some
17 while and it lasted much longer than I thought. So I'm
18 sorry to inconvenience y'all earlier today. I thought we
19 would be done by 11:00, but we didn't get done until about
20 11:30 and so here we are.

21 So, yes, sir.

22 MR. BUNCE: The plaintiff rests.

23 THE COURT: Okay. So that means the plaintiff has
24 completed his presentation of evidence in the case and now
25 is the opportunity for the defense to present any witnesses

00195

Chad Reeves - Direct Examination by Mr. Hendrix

1 they wish to.

2 So, Mr. Hendrix, yes, sir.

3 MR. HENDRIX: May it please, Your Honor, we would
4 call Chad Reeves to the stand.

5 CHAD REEVES,

6 having been duly sworn, testified as follows:

7 THE CLERK: Have a seat, please, and state your
8 name for the record.

9 THE WITNESS: My name is Chad Reeves.

10 DIRECT EXAMINATION

11 BY MR. HENDRIX:

12 Q Mr. Reeves, by whom are you employed?

13 A Blanchard Machinery.

14 Q What does Blanchard Machinery sell?

15 A Heavy equipment.

16 Q Does it also work on it?

17 A Yes, sir.

18 Q Tell the jury what experience you've had and
19 familiarity you have with heavy equipment including a
20 Caterpillar 924-F, I believe it is, front-end loader that
21 is shown in Plaintiff's Exhibit Number 9?

22 A I have over 20 year's experience in heavy
23 equipment. I work -- I've worked on them for over 10 and I
24 currently sell parts for them now.

25 Q Have you ever worked on any 924-F's -- not

00196

Chad Reeves - Direct Examination by Mr. Hendrix

1 particularly that one, but on them in general?

2 A Several, yes.

3 Q And have you had to work on the hydraulic systems
4 and the lifting systems and all that?

5 A Yes.

6 Q Do you know what can go wrong with them and how
7 they operate?

8 A Sure.

9 MR. HENDRIX: Your Honor, we would offer him as an
10 expert in the field of the heavy equipment and specifically
11 the 924-F Caterpillar and the operation and also the repair
12 and what can go wrong with the lifting system?

13 MR. BUNCE: No objection, Your Honor.

14 THE COURT: Okay. All right. Go ahead.

15 BY MR. HENDRIX:

16 Q What causes the -- or what allows the 924-F to be
17 able to lift something whether with forks or with the
18 front-end bucket?

19 A The hydraulic cylinders which are in this picture,
20 you got your two cylinders here for the lifts, one cylinder
21 on the top for your control.

22 Q Okay. And when you do that, you're doing your hand
23 up and down when you say control --

24 A That's your tilt control.

25 Q Tilt control?

00197

Chad Reeves - Direct Examination by Mr. Hendrix

1 A Tilt.

2 Q Tilt control of what?

3 A Either a bucket, forks, or whatever attachment you
4 have on the front of the machine.

5 Q Is it fairly common for these machines to have
6 forks put on them in place of a bucket?

7 A Yes, very common.

8 Q Okay. That's something that y'all accept is going
9 probably happen to some of them; is that right?

10 A Correct.

11 Q Now while you got the picture, I wanted to ask you
12 one thing. I'll try to get over here. Do you see where my
13 finger is? There's a yellow something and it's got looks
14 like I'm going call it dirt or something dark on the end of
15 it and then there's a silver pipe or rod that goes out;
16 what is that?

17 A This is -- this is the cylinder rod. The silver is
18 the rod, this is barrel of the cylinder. This makes up a
19 complete hydraulic cylinder.

20 Q All right. Would you expect to see lubricant of
21 some sort on there?

22 A Yes.

23 Q Would you expect to see it around the edges of it?

24 A Yes.

25 Q Would that probably be the residue of it, the dark

00198

Chad Reeves - Direct Examination by Mr. Hendrix

1 stuff that you see?

2 A Correct.

3 Q All right. And that would be -- if it's working
4 perfectly, you would expect to see all that?

5 A (The witness nodded his head.)

6 Q Is that a yes?

7 A Yes, sir.

8 Q Okay. And it's right here; is that correct?

9 A Yes.

10 Q Now if a previous witness had testified that they
11 saw something, some sort of grease or something on there
12 that would be expected?

13 A Well, you've got lubrication joints all over the
14 front end of the machine that tie to the cylinders. So you
15 could have some residue from petroleum, the grease that you
16 use that goes down the cylinder. So there would be some
17 residue on the cylinders theirself.

18 Q But it would probably be unusual not to have some
19 of that?

20 A Yes, unusual.

21 Q There's been alleged that there was an accident
22 involving this machine. For the sake of -- and you weren't
23 here to hear the testimony, but if you assume for the sake
24 of this question -- well let me ask you this: How can the
25 lift fail if it's got something, weight on it, say an SUV

00199

Chad Reeves - Direct Examination by Mr. Hendrix

1 or a Suburban vehicle and it's got it lifted off the
2 ground, the testimony has been maybe 5 feet, 5'4" or
3 something. What can allow that machine to fail and lower
4 the load or have something happen to it?

5 A The only way it would do it would be catastrophic
6 failure from a cylinder, hose, or human error.

7 Q When you say human error -- well first of all,
8 let's go back. You said a catastrophic failure of a hose
9 or a cylinder. Tell the jury what that would involve and
10 whether or not there would be some evidence that that had
11 happened?

12 A If the cylinder, if the cylinder were to fail,
13 there would be oil everywhere covering the front of the
14 machine, covering the whatever is on the forks. If a line
15 was to break, a hose, it would do the same thing. It would
16 not be just a minute amount of oil, it would be gallons, 5
17 to 10 gallons of oil would be all over the front of the
18 machine, all over the ground. That's really the only
19 two -- the only thing that could fail.

20 Q Okay. If there was been no testimony whatsoever
21 that there was this large amount of fluid on the ground,
22 what would that tell you about how the machine was
23 operating as far as the lift is concerned?

24 A What -- say that again now.

25 Q All right. If you assume that -- that the

00200

Chad Reeves - Direct Examination by Mr. Hendrix

1 testimony has been nobody's mentioned large amounts of
2 hydraulic fluid on the ground, on the machines, on the SUV,
3 anywhere else, if there's none of that, what does that tell
4 you about how the lift system was working when whatever
5 happened at Corder and Sons happened?

6 A That it wouldn't be any evidence of a problem with
7 the machine.

8 Q No problem with the machine?

9 A No problem with the machine.

10 Q What's the only other thing that would make the
11 forks tilt down if it did not have such a failure as you've
12 described?

13 A Someone moved it, manually moving the controls.

14 Q If you assume for the purpose of this question that
15 it was the practice at Corder and Sons when they had a load
16 on the forks to put a steel axle up under it, if you assume
17 for the sake of this question that the steel axle was
18 strong enough that the weight would not compress it and
19 cause it to then break in and of itself and if you also
20 assume that somebody was going to take the lever that
21 controls the tilting of the forks and push down on it,
22 could that -- cause the axle to, when I say fail, to kick
23 out from under it or something to happen to it?

24 A The machine is strong enough to tear up as much it
25 is to lift. So if you manually push down on it, it's

00201

Chad Reeves - Direct Examination by Mr. Hendrix

1 automatically going to push down. It's only going to do
2 what you tell it to do. So if you have something there to
3 support, it'll support.

4 Q How much can this lift?

5 A This machine here can lift 15,000 pounds.

6 Q Do you know how much a, I'm going to say an average
7 SUV or a Suburban would weigh approximately?

8 A 46 to 5300 pounds.

9 Q All right.

10 A Somewhere in that neighborhood. This is capable of
11 doing three times what that vehicle weighed.

12 Q All right. And you say it's capable of tearing up
13 as well as lifting up?

14 A (The witness nodded his head.)

15 Q If you were to have one of these posts under each
16 of the -- one of these pipes, axles, something similar to
17 that, under each of the forks, is the machine strong enough
18 that if you pushed it down and put enough pressure from the
19 forks on that, would it cause both of those to fail?

20 A It could, yes.

21 Q Okay. If you had a -- a frame built and had it on
22 top of the frame and pressed down with the forks, would it
23 be strong enough if the frame was made out of mostly wood,
24 say 10 x 10's or something; is it strong enough to tear
25 that up?

00202

Chad Reeves - Direct Examination by Mr. Hendrix

1 A It is. Yes, it is.

2 Q Okay. Is it strong enough to tear up, if the
3 operator so directed it, tear up any reasonable secondary
4 safety device used to prop it up in case there was a
5 failure of the machine?

6 MR. BUNCE: Objection, Your Honor. That assumed,
7 it's calling for speculation. He hasn't defined what a
8 reasonable secondary safety mechanism would be.

9 THE COURT: I sustain the objection.

10 BY MR. HENDRIX:

11 Q If you assume that a reasonable system would
12 include maybe two pipes out towards the end, the tip of
13 the -- maybe within a foot of the tip of the forks and even
14 if they were attached somehow by strapping or something, is
15 the machine strong enough to cause that to fail?

16 A It is.

17 Q Okay. Is there any way that this machine would
18 have failed and let the forks come down if it had been a
19 failure and not the lift arms come down; do you understand
20 what I'm saying?

21 A Let me just -- you're saying is there any way for
22 the forks theirself to move versus everything to move?

23 Q With a failure.

24 A No. If you have a failure, it's going to affect
25 the whole system.

00203

Chad Reeves - Direct Examination by Mr. Hendrix

1 Q Well, let me ask you to be more specific. I'm
2 going to show you what has been marked as Plaintiff's
3 Exhibit 9 and you see that the -- the lift arms, the yellow
4 things here, are up in the air to some degree; is that
5 correct?

6 A Correct.

7 MR. HENDRIX: Excuse me, Your Honor, if I may show
8 the jury.

9 BY MR. HENDRIX:

10 Q Are you saying that if there was a failure of the
11 machine as you have described that these lift arms would
12 not be in the air?

13 A They would go down as well.

14 Q All right. If they went down as well, I'm going to
15 show you what has been marked as Plaintiff's Exhibit 1,
16 would it be resting in a similar position to that?

17 A A similar position, yes.

18 Q All right. In other words, the forks would be flat
19 on the ground and the arms would be down. So what does the
20 fact if this is a rough or -- and I'm referring now to
21 Plaintiff's Exhibit 9, if this is a rough approximation of
22 the way it looked -- in other words, the lift arms were 5
23 feet, 5'4", but the forks were tilt down -- tilted down,
24 does that tell you anything about whether or not there was
25 a machine failure?

00204

Chad Reeves - Direct Examination by Mr. Hendrix

1 A No, sir.

2 Q Well, when you say no, sir, what do you mean?

3 A Well, by that, just by that picture there's no
4 evidence of a machine problem. Just like I stated earlier,
5 if there was a failure, there would be excessive amounts of
6 oil over the ground, all over the machine.

7 Q And would this -- would it be in a raised position
8 if there had been such a failure?

9 A It would be in a lowered position.

10 Q It would have been not like Exhibit 9, but in the
11 position of Exhibit 1?

12 A One.

13 Q Okay. If you had said it was like that afterwards
14 and there was all kinds of hydraulic fluid and I'm
15 referring now to Plaintiff's Exhibit 1, that might be
16 evidence of some failure?

17 A Correct.

18 Q But not the no fluid and the lift arms off the
19 ground, are up -- that's absolutely not evidence of a
20 machine failure?

21 A Not evidence, no.

22 Q Okay. If an operator were to tilt the, use the
23 lever to tilt the forks while the machine lift arms were
24 off the ground and if you had the axle that I referred to
25 up under one of the forks and there was a to be a failure

00205

Chad Reeves - Direct Examination by Mr. Hendrix

1 of that -- in other words, the tilt -- tilting using the
2 power of the machine were to cause the axle to give way or
3 kick out, how quickly would you expect that to happen?

4 A Instantly. Before you could get out of the
5 machine, it would be instantly.

6 Q Okay. So you wouldn't expect to sit there 10
7 minutes or 4 minutes or anything like that?

8 A No.

9 MR. HENDRIX: Begging the Court's indulgence for
10 one moment?

11 THE COURT: Yes, sir, take your time.

12 (There was a pause in the proceedings.)

13 BY MR. HENDRIX:

14 Q If you assume that the machine has not had a
15 failure as you've described the failure would look like or
16 the evidence of it and it was sitting on this axle and the
17 machine was still operational, how long could it stay in
18 that position?

19 A Until you moved it.

20 Q Well, I mean what about if it was 24 or 48 hours?

21 A It would stay. If it was set on that axle that
22 they're saying was the stand, it would sit there. It
23 wouldn't move until you manually moved it away from where
24 it was sitting.

25 Q If you rest the fork down and put most of the

00206

Chad Reeves - Direct Examination by Mr. Hendrix

1 weight of the SUV, most of the -- I think you said 46 to
2 5300 pounds on the -- the axle -- how difficult would it be
3 to, without using the tilt or without using the power of
4 the machine, how difficult would it be to get the axle out
5 from under there?

6 MR. BUNCE: Objection, Your Honor. I don't think
7 he's laid any foundation for, for this hypothetical,
8 there's no evidence of friction, there's the angles,
9 there's a whole lot of things involved here, Your Honor.

10 THE COURT: How would this be within his expertise,
11 Mr. Hendrix?

12 BY MR. HENDRIX:

13 Q Can you answer, how difficult would it be to get
14 the axle out from under it if --

15 MR. BUNCE: Objection, Your Honor.

16 THE COURT: My question was, to you was how, how is
17 that relevant to this expert's field?

18 BY MR. HENDRIX:

19 Q Well if I could ask him if you know?

20 A Well, with the axle, I don't --

21 THE COURT: Yeah. I sustain the objection.

22 MR. HENDRIX: Okay. That's fine.

23 THE COURT: I sustain the objection.

24 MR. HENDRIX: That's fine, Your Honor.

25 Your Honor, I don't believe I have anything else.

00207

Chad Reeves - Cross-Examination by Mr. Bunce

1 Answer any questions that Mr. Bunce may have for you. And
2 be as nice to him as you have to me.

3 THE COURT: Cross-examination, Mr. Bunce?

4 MR. BUNCE: May I approach, Your Honor?

5 CROSS-EXAMINATION

6 BY MR. BUNCE:

7 Q I show you what's been marked as Plaintiff's
8 Exhibit 16, Mr. Reeves. Have you seen this before?

9 A No, sir.

10 Q Okay. If I represent to you that's the axle that
11 was being discussed, does that look like an axle to you,
12 sir?

13 A That's a tube, a piece of metal tubing that could
14 be used as -- excuse me. It could be used as an axle. I
15 mean, I've seen them used as an axle before, but this, not
16 in this picture.

17 Q Okay. Can you tell what, does the term compressive
18 strength mean something to you?

19 A Uh-huh (affirmative response).

20 Q Okay. Can you tell the compressive strength of the
21 failure point of that axle would be?

22 A No.

23 Q So -- so how can you say that it would necessarily
24 fail by pushing down on it, sir?

25 A Well, the machine itself is capable of lifting

00208

Chad Reeves - Cross-Examination by Mr. Bunce

1 15,000 pounds. It's capable of pushing that 15,000 pounds
2 as well.

3 Q Certainly, but -- but some -- some metal objects
4 are capable of sustaining 15,000 pounds?

5 A Sure.

6 Q Are you -- are you -- is it your opinion that
7 you're telling the jury that that -- that axle can't
8 sustain 15,000 pounds?

9 A I'm not -- I'm -- the stand that they're using --
10 all I've done is tell them what the machine is capable of
11 doing.

12 Q Okay. Well, I'm just asking if your opinion is
13 actually based on your knowledge of what the -- the axle
14 can hold?

15 A I don't -- I'm not -- I don't know about the axle.

16 Q Okay. So you can't really say whether or not the
17 machine would cause that axle to fail if it was pushing
18 down?

19 A Not by this piece of metal here. I don't know what
20 this metal is rated at to hold.

21 Q Sure.

22 A I'm just going by what the machine is capable of
23 doing.

24 Q All right. And the stand that we're talking about,
25 you know what it's rated at?

00209

Chad Reeves - Cross-Examination by Mr. Bunce

- 1 A No, sir.
- 2 Q Okay. So how could you say that the machine can
- 3 necessarily cause it to collapse?
- 4 A Well it's made -- he described it as being made out
- 5 of wood; it's not. Like I said, the machine is capable of
- 6 moving that much weight. It's capable of applying that
- 7 much pressure to move that much weight.
- 8 Q Okay. But you can conceive of a stand that could
- 9 hold 15,000 pounds, correct?
- 10 A Say it again.
- 11 Q You can conceive of a stand that can hold 15,000
- 12 pounds, correct?
- 13 A Well, I mean would it have to hold 15,000 pounds; I
- 14 mean the car only weighs 5,000 pounds. I mean it's kind
- 15 of --
- 16 Q Sure, but what I'm getting at, sir, your testimony
- 17 was that -- I believe is that that Cat can push down so
- 18 much that it's going to cause any stand to fail?
- 19 A No, I didn't say not any stand to fail, no.
- 20 Q Okay. But the stand that you've seen then?
- 21 A No. I haven't seen this before.
- 22 Q Okay. Well what about a wooden stand?
- 23 A I haven't seen a wooden stand.
- 24 Q All right. Can you testify at all about whether
- 25 the Cat pushing down with its full power would cause

00210

Chad Reeves - Cross-Examination by Mr. Bunce

1 anything to fail, in particular in this case?

2 A Sure, I mean, you know, if you put this cup under
3 it, it'd mash the cup. This piece of pipe, if you put it
4 in the dirt, stand it in the dirt, it would press it into
5 the ground.

6 Q Okay. All right. But it wouldn't necessarily make
7 this axle buckle?

8 A I don't know. Just by the picture, you can't tell.

9 Q Okay. And it wouldn't necessarily make a wooden
10 stand buckle; is that correct?

11 A It depends on what it's all made out of.

12 Q Okay. But you -- you -- it would depend on what
13 it's made of, certainly. All right.

14 And I wanted to ask you about the operation of
15 hydraulics then and what -- so say there is an item
16 standing up, a bar of metal and the operator pushes down on
17 that bar of metal with the forks, all right, and continues
18 to apply force or continues to apply the lever, correct,
19 it's going to put additional load and push down further on
20 it, correct?

21 A Correct.

22 Q All right. When you turn off the vehicle, is it
23 going to continue to push down on that?

24 A No, it'll stop.

25 Q Okay.

00211

Chad Reeves - Cross-Examination by Mr. Bunce

- 1 A When you shut the machine off, whatever you set it
2 at is where it's going to stay.
- 3 Q Right, but it was continuing to push down, correct?
- 4 A While it was running.
- 5 Q Okay.
- 6 A While you're operating it, it will continue to push
7 down.
- 8 Q Okay. The hydraulic pumps are trying to push fluid
9 into there, correct?
- 10 A It's not going to do anything unless you move the
11 lever, the controls.
- 12 Q All right.
- 13 A To apply, the lift, the lower the tilt or to roll
14 back, you control all that function.
- 15 Q Yes.
- 16 A The machine is set and running idle and you're not
17 touching the controls, the controls are not doing anything.
- 18 Q Yes.
- 19 A If you put it on a car or pick a car up, let off
20 the lever, it's going to hold it.
- 21 Q Okay. But if you push down on something with the
22 forks and you turn it off, does it level back up; does it
23 stop pushing down?
- 24 A It stops pushing force when you release the levers.
- 25 Q Those pumps, do they have a way of releasing the

00212

Chad Reeves - Cross-Examination by Mr. Bunce

1 pressure then?

2 A Yes, they have relief valves.

3 Q Okay. And so the relief valve, how does it know
4 how much force to take off of there?

5 A It won't take force off. When you let off the
6 controls, if you have applied pressure, it still holds the
7 pressure.

8 Q Okay. All right. So if it's pushing down, it's
9 going to continue pushing down with the same amount of
10 force when you turn it off; is that correct?

11 A It'll hold that pressure when you turn it off.

12 Q Okay.

13 A When you let off the controls, it goes to neutral.

14 Q It goes to neutral so it releases the pressure --

15 A It doesn't release the pressure back. It still
16 holds the pressure here, but it stops, it allows the flow
17 of the hydraulics when you release the controls back to
18 neutral. You still have your pressure applied here,
19 whatever force you put down. Just like when I said while
20 ago, if you picked a car up and you're holding the car
21 here --

22 Q Uh-huh (affirmative response)?

23 A -- you let off the handles, it's still going to
24 hold it here; it's not going to let it fall. It'll still
25 hold here until you manually move the controls.

00213

Chad Reeves - Cross-Examination by Mr. Bunce

- 1 Q Sure.
- 2 A If you cut the machine off, it's still going to
- 3 hold here.
- 4 Q Sure. And that's true whether something prevented
- 5 it from getting to the place it wanted to get to, the
- 6 hydraulics?
- 7 A The only way you're going to do it is when you
- 8 manually move the hydraulics, the controls.
- 9 Q Okay. You ever -- let me ask it this way: In
- 10 operating one of these loaders, sometimes you put the
- 11 bucket down, correct? And you push the bucket down to the
- 12 point where the wheels come off the ground, correct?
- 13 A Correct.
- 14 Q Take off the controls, turn it off, does the wheels
- 15 stay up in the air?
- 16 A Stay up in the air?
- 17 Q Because it's continuing to apply downward force,
- 18 correct?
- 19 A It's put -- it's not continuing to put it -- it's
- 20 holding that --
- 21 Q It's holding what you apply.
- 22 A It's holding what you apply.
- 23 Q Okay. Excellent. The -- have you inspected this
- 24 unit here, sir?
- 25 A Just by the pictures.

00214

Chad Reeves - Redirect Examination by Mr. Hendrix

1 Q Okay. And -- and you work for the same company as
2 Robert Corder; is that correct?

3 A Yes.

4 Q Okay. That's all the questions I have.

5 MR. HENDRIX: Your Honor, just very briefly.

6 REDIRECT EXAMINATION

7 BY MR. HENDRIX:

8 Q Mr. Bunce asked you a bunch of questions about the,
9 the axle and pushing down and the -- the compressive
10 strength and all that. If it were to fail, would you
11 expect it to squash or you know, crush straight down the
12 axle; would there be some other way that you would expect
13 it to fail if you were tilting the forks and not just
14 coming down straight?

15 A If you're tilting them like if you're tilting th
16 force on the axle --

17 Q Right.

18 A -- it wouldn't, it really wouldn't mess, it
19 would -- basically the angle of it would shoot the axle out
20 from under it versus compressing it.

21 Q Okay. And that's what you're talking about it
22 being able to cause it to fail?

23 A Yes.

24 Q Not that you would squash it and just make it crush
25 up like a --

00215

Lindsey Patrick Hartley - Direct Examination by Mr. Hendrix

1 A You wouldn't crush it like soda can, no.

2 Q Okay. Thank you. I don't have any further
3 questions?

4 THE COURT: Recross?

5 MR. BUNCE: No, Your Honor.

6 MR. HENDRIX: Your Honor, we'd ask that this
7 witness be excused.

8 THE COURT: Any objection?

9 MR. BUNCE: Oh, no.

10 THE COURT: Okay. Sir, you're excused. Thank you
11 very much.

12 MR. HENDRIX: Your Honor, we call Mr. Pat Hartley.

13 LINDSEY PATRICK HARTLEY

14 having been duly sworn, testified as follows:

15 THE CLERK: Have a seat and state your full name
16 for the record, please.

17 THE WITNESS: My name is Lindsey Patrick Hartley.

18 DIRECT EXAMINATION

19 BY MR. HENDRIX:

20 Q Mr. Hartley, I'm going to ask you a few personal
21 details to just sort of let you introduce yourself to the
22 jury. How old are you?

23 A 48.

24 Q And who do you work for?

25 A I actually work for myself.

00216

Robert Corder - Direct Examination by Mr. Hendrix

1 ROBERT CORDER,

2 having been duly sworn, testified as follows:

3 THE CLERK: Have a seat and state your full name
4 for the record.

5 THE WITNESS: My name is Robert James Corder. I go
6 by Bubba.

7 DIRECT EXAMINATION

8 BY MR. HENDRIX:

9 Q Is it okay if I call you Bubba?

10 A Yes, sir.

11 Q What is your relationship to Mr. Harold Corder?

12 A That's my father.

13 Q And I believe that you know that he started the
14 salvage business many years ago; is that correct?

15 A Correct.

16 Q Did you go to work there full time for a while?

17 A Yes, sir, from 1989 to 2005.

18 Q And in 2005, what -- where did you go to work after
19 that?

20 A I went to work for Blanchard Machinery.

21 Q Is Blanchard Machinery now what I can call your day
22 job?

23 A Yes, sir.

24 Q You go there Monday to Friday?

25 A Yes, sir.

00217

Robert Corder - Direct Examination by Mr. Hendrix

- 1 Q What do you do on most Saturdays?
- 2 A I go to the salvage yard and do stuff around there
- 3 and keep the books.
- 4 Q All right. Who keeps all the books for the salvage
- 5 yard?
- 6 A I do.
- 7 Q All right. Since you got there and started running
- 8 the place or maybe shortly thereafter in 1989, who has kept
- 9 the books?
- 10 A I have.
- 11 Q Has your dad messed with that at all in that period
- 12 of time?
- 13 A No, sir.
- 14 Q At my request, have you checked all of your records
- 15 for the month of February 2011 as far as what sales were
- 16 made and receipts issued and that sort of thing?
- 17 A Yes, sir.
- 18 Q Was there any indication in any of those records, a
- 19 payment for an engine at all?
- 20 A No, sir.
- 21 Q No?
- 22 A No, sir.
- 23 Q Back during that period of time or really any time
- 24 that you can recall, was it ever the practice for Corder
- 25 and Sons to accept deposits on something like an engine?

00218

Robert Corder - Direct Examination by Mr. Hendrix

- 1 A No, sir.
- 2 Q Okay. So you wouldn't do that; you might pull the
3 engine and if the person didn't come, you'd just store it
4 until somebody else wanted to buy it?
- 5 A Yes, sir.
- 6 Q Have you found any evidence that anybody paid a
7 deposit or paid for an engine in the month of February,
8 2011?
- 9 A No, sir.
- 10 Q Was there a period of time that you understand that
11 Mr. Hogan is claiming he was injured when he had, there was
12 a Suburban lifted up on the Caterpillar 924-F front-end
13 loader with the forks on it and that he got injured and he
14 has said in court that he was in the process of taking an
15 engine out of a Suburban?
- 16 A Yes, sir.
- 17 Q Are you familiar now with that Suburban?
- 18 A Yes, sir.
- 19 Q Had he called you to ask you about a price for the
20 engine in that Suburban during the month of February of
21 2011 for anybody?
- 22 A No, sir.
- 23 Q Did at some point in time, before the accident, he
24 call you about an engine for his own vehicle?
- 25 A Yes, sir, his truck had failed and he needed an

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Robert Corder - Direct Examination by Mr. Hendrix

1 engine to put in it.

2 Q Would the engine in that Suburban SUV have been one
3 that would have worked in his truck?

4 A Yes, sir.

5 Q Who first hired Mr. Hogan?

6 A I did.

7 Q Do you remember approximately when? And I'm not
8 asking you to be exact on the date, but roughly when did he
9 first work for you?

10 A Jerry's worked for me quite a few times off and on
11 through the years. I imagine the first time was around
12 '97, '98, somewhere in that time.

13 Q All right. By the way, about when did -- did you
14 purchase the 924-F Caterpillar?

15 A We purchased it in 1997.

16 Q Okay. And I believe it was a 1995?

17 A A 1995 year.

18 Q That was the model of the --

19 A The 924-F.

20 Q All right. When Mr. Hogan came to work for you, do
21 you know whether he'd ever worked in a salvage yard before?

22 A Yes, sir, he'd been around different salvage yards
23 working on, he'd done auto mechanic work too at different
24 places.

25 Q Okay. Did you understand from him that he had

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Robert Corder - Direct Examination by Mr. Hendrix

1 experience?

2 A Yes, sir.

3 Q In doing salvage work?

4 A Yes, sir.

5 Q Did you ever see him operate the 924-F Caterpillar
6 front-end loader with the forks on it?

7 A Yes, sir.

8 Q Had you ever had him assist you in lifting a load
9 and putting the mobile home axle under the fork to help
10 hold it in case there was a failure; had he ever helped you
11 do that?

12 A Yes, sir, many times.

13 Q Had he ever been the one to operate the -- the lift
14 or the 924-F Caterpillar while that was going on as far as
15 you ever saw?

16 A No, sir, I always operated the machine and he would
17 set the pole.

18 Q But you had seen him moving the, the 924
19 Caterpillar around the yard or moving cars and stuff?

20 A Yes, sir, he would help me when I was tied up.

21 Q Was it your understanding from Mr. Corder (sic)
22 that he'd had experience operating heavy equipment in other
23 jobs that he'd had?

24 A Yes, sir, he'd worked with SP Grading.

25 Q Okay. Approximately when did you start using the

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Robert Corder - Direct Examination by Mr. Hendrix

1 mobile home axle and where did you get the idea for that?

2 What caused you to start doing that?

3 A I visited other junk yards long before I went into
4 business with my dad and over at Billy Walker Salvage in --
5 South Carolina. They use the same similar thing and also
6 at Joe's Auto Parts.

7 Q Joe's Auto Parts; what's that near?

8 A Joe Hartley; he's auto salvage also in Leesville.

9 Q Okay. So it wasn't an incident where something
10 failed that caused you to do it, you just saw them doing it
11 and -- and at -- at least two other yards and decided well
12 it must be a good idea to try it?

13 A We thought it was safe at that time.

14 Q Okay. While you were doing the -- the lowering
15 onto the mobile home axle and using that as a brace, was
16 there ever any occasion where that failed?

17 A No, sir.

18 Q Never?

19 A Never.

20 Q One more thing I wanted to ask you. There's been
21 some talk of when people at Corder and Sons were paid. Was
22 there ever any regular policy of paying people at
23 lunchtime?

24 A No, sir. We got paid at five. My dad come from
25 the old school. You'd work, you earned what you got and

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Robert Corder - Direct Examination by Mr. Hendrix

1 you got paid at five o'clock unless you were getting off
2 and going somewhere.

3 Q Okay. And if you were then you might get paid
4 early?

5 A You might get paid early.

6 Q As far as at Corder and Sons, what training would
7 Mr. Hogan have received as far as lifting a load and
8 putting the axle underneath it?

9 A Just the way we done it together. We -- I would
10 always work the machine and he would set the pole up
11 properly.

12 Q Had you ever suggested to him that it was okay or
13 all right to try to have one person do that?

14 A No, sir. One man can't do it; it's a two-man
15 operation.

16 Q To your knowledge, was there ever any problem with
17 this loader before this accident?

18 A No, sir.

19 Q How soon after the accident did you use the loader?
20 And I believe that the accident testimony has been that it
21 occurred on February the 18th -- Friday, February the 18th,
22 2011; how soon after that did you operate the machine?

23 A The next morning on Saturday.

24 Q Okay. When you got there, what did you do as far
25 as the machine?

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Robert Corder - Direct Examination by Mr. Hendrix

- 1 A Once I got there and started to work, I cranked the
2 machine up and leveled the car off and went to work.
- 3 Q Was there any indication that there was any problem
4 or had been any problem with the machine?
- 5 A No, sir.
- 6 Q Did it work just like it always had?
- 7 A Yes, sir.
- 8 Q When you got there that next morning, was there
9 any -- and you heard, excuse me -- you heard Mr. Reeves
10 testify; is that right?
- 11 A Yes, sir.
- 12 Q You heard him testify about what he would expect to
13 see if there had been a 924-F Caterpillar failure that
14 would cause the forks or anything to go down; you heard
15 that?
- 16 A Yes, sir.
- 17 Q Was there any evidence whatsoever out there that
18 any such thing had happened?
- 19 A No, sir.
- 20 Q Do you think you would have noticed 5 to 10 gallons
21 of hydraulic fluid spewed around and on the ground and on
22 the machinery; do you think you would have noticed that?
- 23 A Yes, sir and noticed it right off the bat.
- 24 Q And you did not?
- 25 A No, sir.

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Robert Corder - Direct Examination by Mr. Hendrix

1 Q Who hired Mr. Hogan?

2 A I did.

3 Q What made you decide to hire him?

4 A Mr. Hogan was without a job and he had a family and
5 my dad needed a little help and he needed a job and I went
6 and asked him if he would like to work some and he said
7 yes, he needed to work.

8 Q Okay. Did you and your father visit Mr. Hogan in
9 the hospital?

10 A Yes, sir. Yes, sir.

11 Q How did he seem to be doing when you visited him in
12 the hospital?

13 A He was happy-go-lucky, sitting up, cutting up with
14 us and just like normal Jerry.

15 Q At that point, did he mention his back?

16 A No, sir.

17 Q What did he tell you he was doing?

18 A At the time of the accident.

19 Q At the time of whatever happened?

20 A He said he was removing a starter.

21 Q He didn't tell you anything about an engine?

22 A No, sir.

23 Q Okay. He said he was removing a starter?

24 A Yes, sir.

25 Q Do you remember there was evidence that a starter

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Robert Corder - Cross-Examination by Mr. Bunce

1 was in the process of being removed?

2 A Well there was no tools there the next morning when
3 we got there is the only thing I can tell you.

4 Q Okay.

5 A No tools laying on the ground or nothing where he
6 would have been working.

7 MR. HENDRIX: Your Honor?

8 THE COURT: Yes, sir.

9 MR. HENDRIX: Begging the Court's indulgence a
10 moment?

11 Your Honor, I don't think I have any further
12 questions at this time.

13 THE COURT: Cross examination, Mr. Bunce?

14 MR. BUNCE: I beg your indulgence, Your Honor.

15 (There was a pause in the proceedings.)

16 CROSS-EXAMINATION

17 BY MR. BUNCE:

18 Q Mr. Corder?

19 A Yes, sir.

20 Q You were asked about some of your books and records
21 there. Those records, are they kept in a bound ledger?

22 A Yes, sir, they're in books and then I transfer them
23 to my computer.

24 Q Okay. And did you bring any of those books from
25 February 2011?

Robert Corder - Cross-Examination by Mr. Bunce

1 A I have a copy of the computer report from the month
2 of February, 2011, yes, sir.

3 Q Okay. But that's the computer one?

4 A Yes, sir.

5 Q Okay. The business there in the office, do y'all
6 track phone orders?

7 A Phone orders, usually they write them down on
8 paper, yes, sir.

9 Q Okay.

10 A What is ordered, it's done.

11 Q Is there a bound up book that it's put in?

12 A Not usually. It's usually just a paperback like a
13 spiral book or something.

14 Q Okay. Something you can tear a page out of?

15 A Well, yes, sir.

16 Q Okay. Now when Mr. Hogan first started working for
17 y'all, you're the one that trained him; is that correct?

18 A Yes, sir.

19 Q Okay. At that time, did you show him the
20 operator's manual on that?

21 A No, sir, not on the machine, no, sir.

22 Q Did you show him any paperwork on how to operate it
23 safely?

24 A Well, he usually didn't operate the machine. Most
25 of the time, I did unless I was just tied up. He would

Robert Corder - Cross-Examination by Mr. Bunce

1 move stuff around sometimes.

2 Q Did y'all have any safety course out there for the
3 salvage yard?

4 A No, sir.

5 Q Now if -- if someone said that -- that placing this
6 could be done by one person, would they be wrong?

7 A Repeat please.

8 Q If someone testified that -- that this operation
9 equipment axle underneath the forks could be done by one
10 person, would they be wrong?

11 A One person can't do it. It has to be a person in
12 the machine and one person holding the post.

13 Q Have you seen any of Mr. Hogan's medical records?

14 A No, sir.

15 Q Okay. Have you -- have you seen any of the
16 transcripts of the doctors deposition or --

17 A Just what I heard yesterday.

18 Q Okay. And you doubt that that happened, sir?

19 A I have no idea how it happened, sir.

20 Q Let me show you what's been marked as Plaintiff's
21 Exhibit 9 here. You seen this before, sir?

22 A Yes, sir.

23 Q Okay. Do you -- do you know how that picture came
24 to be?

25 A No, sir.

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Robert Corder - Redirect Examination by Mr. Hendrix

1 Q All right. When you went out there, I -- when you
2 said you went out there on Saturday?

3 A Saturday morning. It was after the accident, yeah.

4 Q All right. And you didn't go out on that Friday;
5 is that correct?

6 A No, sir.

7 Q So Saturday did you take any pictures?

8 A My brother did, but his phone got, something
9 happened to it. It had some of them.

10 Q That's all the questions I have.

11 MR. HENDRIX: I have one or two.

12 REDIRECT EXAMINATION

13 BY MR. HENDRIX:

14 Q You made mention of the computer records. I'm
15 going to show you something and ask you if this appears to
16 be a printout that you made at my request for the sales
17 during the month of February, 2011?

18 A Yes, sir, this is every ticket that was wrote that
19 month.

20 Q None of the items on there appear to be that big,
21 but let me ask you this. What would you expect to receive
22 when you, if you sold an engine such as was in that SUV
23 that Mr. Hogan was working on?

24 A Around 750 to 850.

25 Q Okay.

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Robert Corder - Redirect Examination by Mr. Hendrix

1 A Hundred.

2 Q Are there any figures on there that come close to
3 that?

4 A No, sir.

5 Q All right.

6 MR. HENDRIX: Your Honor, we would mark this as
7 whatever the exhibit number is --

8 THE COURT REPORTER: 10.

9 MR. HENDRIX: 10?

10 THE COURT REPORTER: Yes, sir.

11 MR. HENDRIX: Plaintiff's Exhibit 10.

12 THE COURT REPORTER: Defense 10.

13 MR. HENDRIX: Defense 10.

14 Your Honor, can I show this to the jury?

15 MR. BUNCE: No objection.

16 THE COURT: It's in evidence. Yes, sir.

17 (Defendant's Exhibit Number 10 was entered into
18 evidence.)

19 MR. HENDRIX: Your Honor, with that, I don't
20 believe I have any further questions.

21 THE COURT: Okay. Cross examination?

22 MR. BUNCE: No recross, Your Honor.

23 THE COURT: All right. Thank you, sir. You may
24 step down.

25 Mr. Hendrix, yes, sir.

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1 MR. HENDRIX: Your Honor, that would be the
2 Defendant's case.

3 THE COURT: All right. Ladies and gentlemen, I'm
4 going to ask you to go to the jury room for a few minutes.
5 Don't talk about the case and continue to keep an open
6 mind. If you'll do me one favor while you're back there
7 and select someone to be the foreperson of the jury and
8 write their name down and give it to the bailiff, I would
9 appreciate that and we'll see you back in just a little
10 bit. I have to take up some matters with the lawyers.

11 Thank you.

12 (The jury left the courtroom at 2:06 p.m.)

13 THE COURT: Okay. Any motions at this stage.

14 POST-TRIAL MOTIONS

15 MR. BUNCE: Actually, yes, Your Honor. At this
16 point, the plaintiff would move for a directed verdict on
17 the defendant's defense of comparative negligence. Here
18 the defendant is bumping up against the res ipsa problem,
19 Your Honor. They -- as they pointed out yesterday, there
20 is no testimony -- there is no evidence, of what caused it
21 to tip.

22 Now the plaintiff's proceeding on a different, a
23 different duty of care and a different way of establishing
24 the breach, proceeding on a statutory, a regulatory duty
25 that sets a different one for an employer. It says a

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1 particular standard for an employer has to do with -- with
2 hazards in the place of employment is free of recognized
3 hazards. There is no corresponding duty on -- on an
4 employee.

5 And so Your Honor, without any evidence of what Mr.
6 Hogan did to cause his injuries, it shouldn't be submitted
7 to the jury. There's simply no evidence that he took any
8 action that caused it. There was no testimony that he was
9 actually in contact with the SUV at the time, that it
10 simply just started rocking.

11 THE COURT: I -- Mr. Hendrix, this is interesting.

12 MR. HENDRIX: Your Honor, I would join that so long
13 as you grant the motion we made at the start and dismiss
14 the entire case because that's what you ought to do in this
15 case. If I can further say that we now have expert
16 testimony that says there's only -- I'm going to narrow it
17 down to two ways this could happen. If there's a hydraulic
18 failure either with the cylinder or with the hose, but
19 there was absolutely no evidence of that. And there's no
20 evidence to say that's not right; that it wouldn't have 5
21 or 10 gallons of fluid everywhere. The only other way it
22 could happen, according to the expert, is for somebody to
23 do it and if they did it, it should be expected to happen
24 quickly, not 5 to 10 minutes or something like that later
25 and the only person that was out there to have done that

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1 within the time frame would have been Mr. Hogan by even his
2 testimony and even the, his witnesses testimony, Natasha
3 Smith especially, and even his experts testimony who did
4 say that based on the evidence, the most likely person that
5 set this up was Jerry Hogan.

6 So if you consider all of that, it has to be
7 operator error and, Your Honor, I got to thinking about
8 this later. I didn't argue this yesterday, but I am going
9 to argue it now that who's to say what's the secondary
10 system? We've been calling the axle the secondary system,
11 but there are two systems here that have to fail before
12 there can be an accident and have they have not proved that
13 the first system failed. All they've proved is that maybe
14 something happened, but if it's only, if there was not a
15 failure and it had to be operator error and even his own
16 expert says the most likely person to have set this up was
17 Mr. Hogan, then it falls on him. They have to prove, we
18 believe, that Mr. Hogan, that Corder and Sons were the ones
19 that were responsible, we believe for both failures in
20 order for this to happen. Because it never would have
21 happened except for the failure of whatever happened
22 happened with the machine. If it never would have
23 happened, then we believe that the only reasonable
24 conclusion under all the evidence is that that's on Mr.
25 Hogan and that the Corders shouldn't be responsible for

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1 that.

2 There's also been testimony which we believe would
3 show that the system used as directed was adequate. I
4 mean, you can make anything fail and I think that our
5 expert indicated that the machine's strong enough that if
6 you tilt those things, it's not, no longer flat on it and
7 it'd be kicking out from under it and that that could --
8 would be the explanation for this, but you'd expect for
9 that to happen pretty quick.

10 The bottom line is that we think that we have
11 clearly shown, there's plenty of evidence, that he, in
12 fact, did make the error that started this chain of events
13 that resulted in whatever happened out there. As Mr. Bunce
14 had indicated yesterday, if there's circumstantial evidence
15 with his expert saying the most likely person to have set
16 this -- this machine up in the position that it was in at
17 the time that whatever happened happened, was Mr. Hogan.

18 If the ladies that he called as his witnesses, one
19 of Ms. Natasha Smith, testified that they were inside
20 talking with Mr. Corder when they heard a machine running.
21 I mean the only reasonable conclusion from this, it would
22 take speculation and everything else, surmise, speculation,
23 and conjecture if I can use that terminology that anybody
24 other than Mr. Hogan started this ball rolling.

25 So we certainly think -- first of all we think you

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1 ought to go ahead and dismiss the case at this point in
2 time, but if you see fit not to, certainly we're entitled
3 to the -- to the charge on comparative negligence. He
4 doesn't get a free ride because he messed up so bad with
5 this machine that -- that the secondary system, which was
6 in place, wasn't enough to save him. Because as it's been
7 testified, this stuff might be good and it might work good,
8 but the machine is strong enough if you do something wrong,
9 you can make it fail. The same with the other stuff. He
10 made it fail and Corder and Sons shouldn't bear the
11 responsibility of that.

12 THE COURT: Thank you.

13 MR. BUNCE: Getting the ball rolling, Your Honor,
14 the duty and the negligent act here is not starting the
15 ball rolling. The negligent act of employees in here is
16 the statutory duty to have a backstop. All right. And
17 that is it. The duty we're getting to here, the duty that,
18 is that and it's from Regulation, it's a request to charge
19 here -- but the regulation states, An employer owes a duty
20 to maintain a place of employment which is free of
21 recognized hazards which may cause death or serious harm to
22 his employees.

23 So the duty is to have a safe place to work. Mr.
24 Fournier gave testimony that working under a suspended load
25 without adequate secondary supports was a recognized hazard

1 of this type. All right. So there's the duty is to have
2 that secondary system in place when you have people working
3 underneath it. All right. And the adequate requires two
4 supports. And so here, the break, that's the duty; the
5 breach is to have Mr. Hogan working under it with only one
6 support. So we've got a duty and a breach and from that
7 point, there is no break in that chain from there, the
8 proximate cause here, right.

9 It doesn't matter what caused it move because the
10 duty was to have a -- provide a backup in essence here.
11 This is -- you know, we talked about the picture case.
12 This is different from the picture case because there's no
13 duty there in those sorts of cases. This is more analogous
14 to -- to safety guards on machines. The duty is to have it
15 there just for the very simple purpose that things can
16 inadvertently happen. And so -- if the -- the -- the, in
17 those instances, it's not what caused it go in that's
18 important; it's whether or not there's an adequate
19 safeguard there to prevent injury.

20 The same way with automobile cases and defective
21 design cases there, Your Honor, and the -- if the craft
22 worthiness -- if the duty is to have a safe interior and
23 you don't have a knob on the gearshift or you have the
24 corner of the ashtray that's sharp, it doesn't matter what
25 caused the wreck. That's not important. The issue is the

1 safety that was intended to protect for had that in place.
2 And this is intended to protect in just the same sort of
3 situation. It's foreseen, it's in the standards. The
4 standards say that that's the -- that safety is the reason
5 for this and so it's a matter of where you place the duty
6 and where you do that -- and so here, the duty is to have
7 this adequate system in place.

8 There's a breach of it and so we've got, we don't
9 have a res ipsa problem. Proximate cause, there's nothing
10 here that causes a problem in the chain of events that's in
11 place because the proximate cause issue or maybe a res ipsa
12 problem would be if there was an adequate system and then
13 you couldn't explain why it still failed. But here we
14 don't have any of that. There was an adequate system in
15 the first place.

16 It may not seem highly logical that we could be in
17 this situation where it wouldn't be comparative, but, Your
18 Honor, we don't rely on showing the -- the other act caused
19 the tipping or caused it to move; that's irrelevant here
20 because this was supposed to be a safeguard.

21 MR. HENDRIX: And a safeguard was there. They've
22 got their hired gun, their expert, who wants to say that it
23 was inadequate, but even he doesn't doubt that it was
24 there. They had a safeguard. As our expert, Mr. Reeves,
25 testified, you can make that fail. And I believe he

1 testified that even if you had one of the posts under each
2 one as suggested by Mr. Fournier, that the machine was
3 strong enough, if you tilt it down with all the power of
4 the machine, they would fail. You can make reasonable
5 safeguards fail. There was a reasonable safeguard, our
6 position is, in place. The fact that Mr. Fournier doesn't
7 like it and comes in to say that it should be this and it
8 should be that doesn't mean that what was there under the
9 circumstances wasn't reasonable.

10 I mean I think you have one standard for NASA and
11 another standard for, for salvage yards. I mean you don't
12 have the level of technology. You don't have the level of
13 ability to pay at a salvage yard that you would something a
14 U.S. Military or -- or NASA or things of that description.
15 There's got to be varying degrees. I believe all of this
16 has to be what is reasonable under the circumstances and we
17 submit to Your Honor, that it would be that what they had
18 was reasonable under the circumstances if applied properly
19 by the person using it, which it was not because we believe
20 that the preponderance of the credible evidence is that
21 Mr. -- Mr. Hogan, who claimed never to have operated the
22 machine, operated the machine and set this up by himself,
23 which I think it's fair to assume from the testimony of Mr.
24 Bubba Corder, if I may call him that, Mr. Robert Corder,
25 that Mr. Hogan had never done that when Mr. Robert Corder

1 was there with him. He'd never set it up a one-person
2 operation.

3 He had to have the other person out there. We
4 think the evidence is clear that Mr. -- for whatever
5 reason, that Mr. Hogan did it on his own violating the
6 policy and the instructions of his employers and caused
7 this accident.

8 MR. BUNCE: I will be very brief, Your Honor. Of
9 course, he's getting to the weight of the evidence because
10 there was opposing testimony. The only -- in fact, the
11 only testimony about the adequacy of the system in place
12 was that it was inadequate and this is beyond the outside
13 of the province of the jury to determine if this was
14 adequate or not. The adequacy -- if Mr. Fournier's
15 testimony was not that there had to be some sort of
16 safeguard in place or that there had to be some sort of
17 temporary supports in place; that it has to be adequate
18 temporary supports.

19 MR. HENDRIX: Your Honor, I don't believe that
20 there's anything in the law that says that, that you have
21 to accept what an expert says or any jury or judge has to
22 accept what an expert says that's the gospel, that's the
23 end of it. So I think he's wrong in that regard. The fact
24 that Mr. Fournier, in his opinion, thought that the system
25 they had was inadequate, it is not the bottom line on the

1 deal; that's not the last word on it.

2 THE COURT: The issue in front me right now is the
3 plaintiff's motion for directed verdict on the defense for
4 comparative negligence. There is evidence in the record of
5 credibility which is entirely up to the jury that would
6 place Mr. Hogan in control of the forklift prior to the
7 accident. When an instrumentality that causes injury
8 should have been management of the party and the accident
9 is such as in the ordinary course of things doesn't happen
10 and those who have the management use proper care that
11 provides reasonable evidence in the absence of an
12 explanation by that party, that the action arose from a
13 want of care and that's from Childers v. Gaslines, Inc 248
14 S.C. 316, 1966, which relied on a 1958 case called Shephard
15 v. United States Fidelity and Guaranty Company, which as
16 y'all may remember was a parked car that had been left in
17 the same state as it had been when the owner parked it. It
18 rolled out of a driveway into the street and caused a wreck
19 with the plaintiff's car and the Court held that the
20 defendant's negligence could be sent to the jury because
21 unexpected presence on the highway of a runaway automobile
22 without a driver or occupant raised a prima facie inference
23 of negligence on the part of the owner.

24 Being of itself sufficient to take the case from
25 the jury and sufficient to warrant the jury to prove he was

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1 negligent. So this is all from a discussion by -- Felix
2 and on our State's "flexible approach to inferences" in the
3 context of circumstantial evidence. And why we don't
4 recognize *res ipsa loquitur*.

5 Now that means I deny your motion, but I appreciate
6 y'all's fine arguments.

7 All right. Anything else.

8 MR. HENDRIX: Yes, sir, Your Honor. We just renew
9 our motion and I won't argue it again unless you want to
10 hear more. I think -- I'd ask you to just remember all
11 that and we would seriously ask you to dismiss the case.
12 We believe that they've got -- the burdens on them that
13 they can't explain and -- like I'm saying, honestly, I
14 don't think that there's anything that shows that there's a
15 definite violation of any statute here. So I mean, I don't
16 think that they're, I think it's just looking at who caused
17 the accident and they have not shown that there was any
18 failure or negligence on the part of Corder and Sons that
19 started the events and I think it's admitted that if the --
20 if there was not a failure of the machine, it's more than
21 capable of holding this SUV indefinitely it'll be there
22 when you come back especially with the prop under there;
23 that the only thing that could have caused the failure
24 since there was absolutely no evidence of a machine failure
25 or a hydraulics failure, no evidence whatever, is that Mr.

1 Hogan caused this to happen and that being the case, we
2 submit it shouldn't be sent to the jury and to do
3 otherwise, we do think there's sort of a res ipsa case here
4 is that you've got two things; either one will -- will --
5 will prevent this accident from happening and they don't
6 have any evidence that the first step of what caused it to
7 slip.

8 We think to that extent, it's like the picture case
9 in that my understanding that there was essentially no
10 evidence of what made it fall. Well, there's no evidence
11 that the Corders had any responsibility for the start of
12 this, for whatever made the forks tilt, none and there is
13 evidence that Mr. Hogan most probably had something to do
14 with that. Without proof of what started it, we think that
15 the res ipsa thing does click in and the same theory as
16 stated in the I believe it was Orr v. Greenville County
17 Hospital Systems that those elements would apply and we'd
18 ask you to dismiss.

19 THE COURT: Well, I understand your argument, Mr.
20 Hendrix. I think the difference is Mr. Bunce is focusing
21 his negligence claim on that second tier of safety. In
22 other words he's saying it doesn't matter what caused the
23 first failure, he doesn't have to prove that and just has
24 to prove that there was negligence in the backup system
25 because obviously Corder and Sons believed it was

1 foreseeable that there would be a failure of the lift, it
2 had to be stopped in order to create a safe working place
3 and Mr. Bunce's argument on behalf of his client, Mr.
4 Hogan, is that the system was unreasonable and the
5 proximate cause of Mr. Hogan's injuries and he's got the
6 expert testimony, Mr. Fournier, to back that up if the jury
7 believes it. So while I understand your argument, I adhere
8 to my earlier ruling.

9 The picture case, at least the Order of the Court
10 of Appeals unlike the Order of the Trial Court, did not
11 discuss Cheney v. Burgess, Hubert and Felix or the Shephard
12 v. USF&G cases. All right. Thank you.

13 MR. HENDRIX: Thank you, Your Honor.

14 THE COURT: Anything further?

15 MR. HENDRIX: Nothing further.

16 JURY CHARGE CONFERENCE

17 MR. BUNCE: I -- I gather you will tell us what the
18 charges are here, Your Honor.

19 MR. HENDRIX: Your Honor, we had handed up some
20 requests to charge for you to consider. I think
21 ultimately, of course, I always feel like that's up to you,
22 but --

23 THE COURT: Yes, sir, I've got your requests to
24 charge. I think I cover all of them except I -- I don't
25 know if y'all want to be heard on concurring cause, but

00243

1 can't leave it to conjecture. They can't tell you what he
2 did wrong. They don't know. They can't point to anything,
3 they just think it must be wrong because something bad
4 happened. That's not enough, ladies and gentlemen, to find
5 Mr. Hogan negligent. Certainly not enough to find him
6 negligent using their procedures. All right. That's why I
7 told you I was going to come back here and say you
8 shouldn't find that he's negligent because they haven't
9 shown you anything he did wrong; just maybe, maybe, maybe,
10 could have been, could have been, could have been. All
11 right.

12 I've made our point very clear that from Mr.
13 Hogan's perspective, it doesn't matter where you start or
14 what happened, what started it coming down, it's the lack
15 of it that's the breach-for Corder and Sons. They have a
16 different duty because the employer provides the tools. He
17 can't bring in his own tools and his own procedures. He
18 has to go with what they have, what they provide and that's
19 why the duties are different. The responsibilities are
20 different here -- or at this point, you know, you can blame
21 the least of our society, he who has the least choices at
22 their disposal or find somebody else.

23 Thank you.

24 JURY CHARGE

25 THE COURT: All right. Thank you. Ladies and

00244

1 gentlemen, now you've heard from the lawyers and you've
2 heard all the evidence in the case. It's my duty to
3 instruct you on the law that applies to this case and it's
4 your duty to find the facts from the evidence. To those
5 facts, you must apply the law as I give it to you and you
6 must follow the law as I give it to you. You should not be
7 concerned with what the law should be, but what it is and
8 you should not be influenced by any personal likes or
9 dislikes, opinions or prejudices or undue sympathy and that
10 means you must decide this case solely on the evidence
11 before you and according to the law. And you recall you
12 took an oath to do just that when we began the trial on
13 Monday.

14 Now in following my instructions, you must follow
15 them all and not single out some and ignore others because
16 they're all equally important and you should not read into
17 these instructions or into anything I have said or done
18 during this trial as any indication as to what I think the
19 fact are or what your verdict should be because that is a
20 matter -- a matter entirely for you to decide because our
21 system of justice and our constitution, you and you alone
22 are the judges of the facts.

23 You decide what the facts are by evaluating and
24 weighing the evidence you've heard during this trial and
25 there's no way for you to weigh the evidence in a literal

00245

1 since. I'm not going give you a set of scales to take back
2 there and conduct experiments of course. It's entirely a
3 mental process and you simple weigh and evaluate the
4 evidence by using your good common sense, your life
5 experiences and your sense of reason and judgment and you
6 bring those things to bear on the evidence that you've
7 heard.

8 I told you at the outset that a party who seeks a
9 verdict from you has the burden of proof and that burden is
10 in a civil case called the greater weight of the evidence
11 and that means the party must produce evidence which
12 considered in light of all the facts, leads you to believe
13 that what you're trying to show is more likely true than
14 not true. If you were to put each sides evidence on
15 opposite sides of the scales, the party who is seeking to
16 prevail on a claim would have to make the scales tip
17 slightly on his side in order to prevail.

18 If the party fails to do that, then the verdict
19 must be for the other party. So what you have to do is
20 mentally weigh the evidence and mentally place it on the
21 scales and see which sides evidence has the greater weight
22 in your mind. If after you do that, the scales are evenly
23 balanced and there's not a greater weight on either side,
24 then the parties failed to meet their burden of proof on
25 that claim and you must decide for the other party. So you

1 may be familiar with the burden of proof in criminal cases,
2 which is proof beyond a reasonable doubt and I've already
3 told you that that is a higher standard that does not apply
4 in this case, which is a civil matter.

5 Now I told you that you have to decide the facts
6 and you must decide the facts from the evidence and you'll
7 recall I told you Monday that evidence consists of two
8 things; sworn witness testimony and exhibits, nothing else
9 is evidence, so don't take anything else into account. The
10 arguments of the lawyers don't constitute evidence and if
11 you remember the testimony or evidence different from the
12 way they remember it; your memory controls. Anything you
13 may have seen or heard when court is not in session is not
14 evidence.

15 Now, there are also two different types of evidence
16 and what I'm talking about now is circumstantial and direct
17 evidence. You've probably heard those terms before and I
18 want to go over those terms with you briefly. Direct
19 evidence is direct proof of a fact, such as the testimony
20 of an eyewitness. It is evidence that if believed,
21 immediately establishes a fact.

22 Circumstantial evidence is indirect evidence, that
23 is proof of a chain of facts from which you could find
24 another fact exists even though it has not been proven
25 directly. A party may prove their case by circumstantial

00247

1 evidence, direct evidence or some combination. The law
2 makes no distinction between the weight or value to be
3 given either direct or circumstantial evidence. You're
4 entitled to consider both and the State -- a party may use
5 either.

6 Now, as a judge of the facts, I told you that you
7 would have to, by necessity, determine the credibility of
8 all the evidence. So that means for every witness who
9 testified and every exhibit that's been admitted, you have
10 to gauge its believability. You can use numerous tools to
11 do that. In the case of a witness who testifies, you can
12 consider, if you choose to, their ability that they had to
13 see, hear, or know the things about which they testified.
14 You can consider how well they were able to recall and
15 describe those things. You can consider their demeanor.
16 You can consider how their testimony stacks up against the
17 other evidence in the case; was it consistent or
18 inconsistent. You may consider if the witness had some
19 interest in the outcome of the case; whether they were
20 biased or prejudice towards someone or something in the
21 case.

22 You may consider anything you use in your
23 day-to-day life when you decide whether someone is worthy
24 of belief because you certainly didn't check your common
25 sense at the door of the Lexington County Courthouse.

1 Now, you may believe as much or as little of each
2 witness's testimony as you think proper. You can believe
3 everything a witness says; you can believe nothing a
4 witness says. You can believe parts of their testimony and
5 disbelieve other parts. You can believe one witness over
6 several or several over one, but you certainly don't
7 determine this matter of credibility simply by counting up
8 the witnesses on either side because your sole job is to
9 determine the truth in this case when it comes to
10 determining the facts. And it doesn't matter to you
11 whether that truth comes from a witness for the plaintiff
12 or for the defendant.

13 You've heard testimony from expert witnesses and I
14 instructed you how someone is qualified as an expert
15 testimony, but you can judge expert testimony just like any
16 other testimony. That is you can accept it or reject it or
17 give it whatever weight you think it deserves.

18 You also heard deposition testimony. I told you
19 that's to be treated the same as, as live testimony and
20 again, you're the judge of the credibility of that
21 testimony as well.

22 And I'm now going to move on to the actual law that
23 applies to the claims in this case.

24 I also told you Monday that the defendant, Corder
25 and Sons, Incorporated, is a corporation and no distinction

00249

1 is made by the law between corporations and individuals. A
2 corporation is a person in the eyes of the law because they
3 can only act through people, their agents and employees and
4 they're responsible for any negligent acts or omissions of
5 their officers or employees while they are acting within
6 the scope of their authority or employment, which
7 proximately causes injury to another person.

8 Now in this case, Mr. Hogan is claiming that Corder
9 and Sons, Incorporated was negligent and their negligence
10 proximately caused his injuries and that he should be
11 awarded damages. To prevail on this claim and to prove it,
12 Mr. Hogan must prove by the greater weight of the evidence
13 three things. First, he must prove that Corder and Sons,
14 Incorporated breached a duty of care owed to him by a
15 negligent act or omission; second, he must prove that he
16 suffered damages as a result of that breach of duty by
17 Corder and Sons, Incorporated; and third and finally, he
18 must prove that damages were approximately caused by Corder
19 and Sons breach of duty.

20 When a plaintiff has the burden of proving
21 negligence by the greater weight of the evidence, it is
22 important that you understand what the term negligence
23 means. In law, negligence is the breach of a duty of care
24 owed to a plaintiff by the defendant. Negligence is
25 defined as the absence of due or ordinary care. The lack

00250

1 of due care is the failure to do something that a person of
2 ordinary care and prudence would have done under the
3 circumstances existing at the time. Carelessness is
4 another word for negligence. If you have trouble with the
5 word negligence because it's a legal term, you can
6 substitute careless as it means the same thing. It is
7 either the failing to do something that an ordinary and
8 reasonable person would have done under the same
9 circumstances or is doing something that an ordinary and
10 reasonable person would not have done under the same
11 circumstances.

12 Now a plaintiff's burden of proof in a negligence
13 case cannot be met by relying on the theory that the very
14 fact of injury or the claim of injury by itself means that
15 someone was negligent. The burden of proof is on the
16 plaintiff to establish that negligent conduct by the
17 greater weight of the evidence.

18 Now you've heard the term proximate cause and that
19 is something that the plaintiff must prove by the greater
20 weight of the evidence that his damages were proximately
21 caused by the defendant's negligence. The law defines
22 proximate cause as something that produces a natural chain
23 of events that in the end brings about the injury. It is
24 the direct cause of the injury. To prove that a
25 defendant's negligence proximately caused the plaintiff's

00251

1 injury, the plaintiff must first prove causation and fact
2 and that's proven by showing the injury would not have
3 occurred but for the defendant's negligence. A plaintiff
4 must also prove something called legal cause and that is
5 shown by proving that the injury was foreseeable. This
6 means the injury occurs by a natural and probable
7 consequence of the defendant's negligence. A plaintiff
8 must prove that some injury from the defendant's negligence
9 was foreseeable, but he does not have to prove that the
10 specific and particular injury that occurred was
11 foreseeable. As I've said, the defendant may be held
12 liable for anything that appears to have been a natural and
13 probable consequence of his negligence. However, a
14 defendant cannot be held responsible for things that could
15 not be reasonably expected to happen.

16 Where the cause of a plaintiff's injury can
17 reasonably be attributed to an act for which the defendant
18 is not responsible as to an act for which he is
19 responsible, then the plaintiff has failed to carry his
20 burden of establishing that his injuries were the proximate
21 result of the defendant's negligence. However, proximate
22 cause does not mean the sole or only cause. A defendant's
23 act can be a proximate cause of plaintiff's injury if it
24 was at least one of the direct concurring causes of the
25 injury.

1 Now in this case, Mr. Hogan claims that the
2 defendant failed to follow a provision of our State Code of
3 Regulations which in this case comes under Regulation
4 71-112 and states in part, That employers shall maintain a
5 place of employment which is free of recognized hazards
6 which may cause death or serious physical harm to his
7 employees.

8 So the plaintiff claims that the defendant failed
9 to follow the rule set by the statute. The failure to
10 follow a statutory rule can be -- is negligence as a matter
11 of law. If you find the defendant failed to follow a
12 statutory rule, negligence has been proven and the next
13 thing you would decide is whether the defendant's
14 negligence proximately caused the plaintiff's injuries.
15 The violation of a statute does not in itself constitute
16 recklessness, willfulness, and wantonance -- wantonness,
17 excuse me. However, it may be considered as evidence in
18 deciding whether the defendant was reckless, willful and
19 wanton.

20 It is the duty of a company to provide a reasonably
21 safe place for work for its employees. The law imposes the
22 duty upon all companies to provide its employees with
23 reasonably safe and suitable equipment and a party who goes
24 to work for a company has a right to assume the company has
25 a reasonably safe and suitable appliances to do the work.

00253

1 Now if you decide the plaintiff is entitled to a
2 verdict, your next step would be to decide how much money
3 the defendant should be required to pay. When one is
4 injured by the negligence of another and that injury was
5 proximately caused by the negligence, the injured person is
6 entitled to be fully compensated for all injuries directly
7 or proximately resulting from any negligent act or omission
8 by the defendant.

9 The purpose of actual damages is to compensate the
10 plaintiff for his injuries or loss and to put him as far as
11 possible, in the same position he was in before the
12 injuries occurred. So actual damages would be the actual
13 losses and expenses the plaintiff has suffered because of
14 the defendant's negligence.

15 For a plaintiff who has been physically injured,
16 these damages can include pain and suffering, both past and
17 future, as well as mental anguish, impairment of health or
18 physical condition and disfigurement.

19 The plaintiff may also claim loss of wages due to
20 absence from work and reduced earning ability for the
21 future.

22 In determining the amount of compensation for
23 personal injuries, it's proper to consider past and present
24 aspects of the injury. This would include physical and
25 mental pain and suffering, expenses incurred for necessary

00254

1 medical treatment, loss of earning ability, loss of
2 enjoyment of life and any other losses that are reflected
3 by the character of the injury. An injured party may
4 recover for those future damages that are reasonably sure
5 to result.

6 The principle underlying the recovery for future
7 damages is that the party can only bring one action for his
8 injuries and, therefore, it is proper that he can claim and
9 recover future damages if he has demonstrated they will,
10 with reasonable certainty, result. A party, however, is
11 never entitled to recover damages that are speculative in
12 nature, but if you find the party is entitled to a verdict
13 for damages, your verdict should include an amount to cover
14 any past, present, and future damages, which were
15 proximately caused by the defendant and any future damages
16 must be reasonably certain to occur in the future as a
17 result of the defendant's negligence.

18 Now in a personal injury action, the general rule
19 is the plaintiff may recover for the necessary and
20 reasonable expenses caused by the injury such as medical
21 expenses. The recovery for medical expenses is controlled
22 by what the services rendered were reasonably worth and not
23 by what was actually paid or contracted to be paid. The
24 plaintiff must prove that the expenses caused by the injury
25 were necessary and reasonable. If you determine that the

00255

1 plaintiff is entitled to recover damages, including
2 medical, hospital, or other healthcare costs, the plaintiff
3 can only recover such sums as you deem to be both
4 reasonable and necessary.

5 While the amount actually charged and incurred may
6 be considered by you, you're not bound by that amount. You
7 must find only such sum as is reasonable and necessary. To
8 recover for future medical expenses, the plaintiff must
9 prove such expenses as are reasonably certain to result in
10 the future.

11 Now pain and suffering is the recognized aspect of
12 damages in personal injury cases and pain and suffering
13 compensates a party for physical discomfort and emotional
14 response to the sensation of pain caused by the injury
15 itself. Mental suffering, apprehension, shock, fear,
16 anxiety, emotional upset, humiliation, either present or
17 expected in the future, can be proper elements of damages.
18 Mental suffering covers not only the pain associated with
19 the injury, but also the mental reaction to that pain and
20 to the possible consequences of the injury.

21 Loss of the capacity to enjoy life resulting from
22 personal injury is a proper element of damages. Damages
23 for loss of enjoyment of life compensate for limitations
24 resulting from the defendant's negligence on the injured
25 person's ability to participate in and derive pleasure from

00256

1 the normal activities of daily life or for the individuals
2 inability to pursue his talents, recreational interests,
3 hobbies or avocations.

4 These elements of damages, pain and suffering,
5 mental anguish, loss of enjoyment of life, have no market
6 place. There's no way you can go buy these items, of
7 course, so they're not capable of exact measurement. So,
8 you, the jury, will have to determine what amount you feel
9 is fair and reasonable based on your view of the evidence.

10 Now the loss of earning capacity or the impairment
11 of such capacity that has resulted from injuries to the
12 plaintiff is also a proper element of damages.

13 In determining the amount of damages due to a
14 plaintiff for loss or impairment of earnings, you should
15 consider the loss of future earning power, the affect the
16 impairment will have on his capacity to work, the extent
17 the impairment will impair his earning capacity, the
18 present value of all losses due to his impaired learning
19 power and the physical pain and suffering as reasonably
20 certain will result in the future from his injuries.

21 The evidence of what the plaintiff had previously
22 earned when employed in the past is a factor you may
23 consider. You may also award him damages for the loss or
24 decrease of earning capacity during his entire life
25 expectancy. In the determining the loss of earning

1 capacity that may result in the future, the fact that the
2 plaintiff was making the same or more since the injury,
3 there's only one factor to consider.

4 Now, ladies and gentlemen, if you determine the
5 plaintiff is entitled to damages for impairment of earning
6 capacity, you must decide the amount of damages using the
7 life expectancy table as a guide. This is simply a table
8 our legislature has -- has set up that estimates the
9 probable remaining length of life of all people in our
10 state at a given age. Mr. Hogan's life expectancy
11 according to his table is 28.28 years as he is a 51 year
12 old male. This may be considered by you along with any
13 other facts and circumstances that bear on his life
14 expectancy including his occupation, habits and health in
15 deciding the amount of damages to be awarded.

16 Now the defendant claims the plaintiff had
17 pre-existing injuries or conditions before the date of this
18 incident that -- and if you find the plaintiff received the
19 injury as a result of the defendant's negligence and is
20 entitled to recover damages for that injury, the fact that
21 he had a pre-existing injury or condition would not prevent
22 Mr. Hogan from recovering, but the defendant is responsible
23 for all ill effects which considering the plaintiff's
24 condition of health when the plaintiff was injured
25 naturally and necessarily followed the injury. The

00258

1 defendant takes the plaintiff as the plaintiff is found,
2 whether the plaintiff is in perfect health, poor health or
3 somewhere in between.

4 A defendant's liability is in no way lessened or
5 affected because of the fact that the injury would not have
6 resulted or would not have been as serious or severe had
7 the plaintiff been in good health or that the injuries were
8 aggravated and rendered more difficult to cure by reason of
9 the fact that the plaintiff was not in good health. If the
10 presence of a pre-existing injury or condition aggravates
11 and prolongs the injury and increases the damages, the
12 plaintiff should be compensated for the increase or added
13 damages. A person with a pre-existing injury or condition
14 is not however entitled to any compensation for the
15 pre-existing injury or condition itself. In addition, if
16 the problems are the result of a natural progression or the
17 worsening of pre-existing injury or condition, then the
18 plaintiff would not be not entitled to be compensated for
19 those problems.

20 Now someone who has suffered damages from the
21 negligence of another is under a duty to make all
22 reasonable efforts to minimize the damages incurred to the
23 extent a plaintiff reasonably could have so minimized his
24 damages and failed to do so, he is not entitled to recover
25 from the other party. In other words, one cannot recover

00259

1 any damage that might have been avoided by the use of
2 reasonable care and diligence.

3 The efforts required of a plaintiff to minimize his
4 damages must be determined by common sense and the rule of
5 fair dealing and what a person of ordinary and reason and
6 prudence would have done under the same circumstances. The
7 plaintiff is not required to use unreasonable efforts or go
8 to great expense to avoid and lessen the damages. The
9 defendant bears the burden of failure to lessen damages on
10 the part of the plaintiff by the greater weight of the
11 evidence.

12 If you find the plaintiff failed to mitigate his
13 damages, the plaintiff may recover damages for the injuries
14 themselves, but not damages for the aggravation of the
15 injuries that could have been reasonably avoided.

16 Now the plaintiff bears the burden of proving by
17 the greater weight of the evidence that he's entitled to
18 damages. The existence, causation, or amount of damages
19 cannot be left to speculation or guesswork. However, proof
20 of the amount of loss with absolute or mathematical
21 certainty is not required. Damages must be proved to a
22 reasonable degree of certainty and the evidence presented
23 by the plaintiff must enable you to determine what amount
24 is fair, just, and reasonable.

25 Now the last thing I need to go over with you about

1 the law is the claim of the defendant that Mr. Hogan was
2 also negligent and this law is known as comparative
3 negligence. So what we have is Corder and Sons,
4 Incorporated are not only denying negligence for
5 wrongdoing, but any responsibility for the damages claimed
6 by Mr. Hogan, but they also claim that Mr. Hogan was at
7 fault.

8 So they're saying in essence, that even if the jury
9 finds that we were at fault, it required the fault of each
10 of us for the damages to have occurred and this is
11 something they're saying in the alternative. So what we
12 have then is a case where both sides claim the other is
13 responsible for the damages and the accident. So this law
14 known as comparative negligence, means that depending on
15 your view of the evidence, you may find both parties to be
16 negligent and both parties liable in some proportion.
17 Under this law, you, as the jury, must compare the
18 negligence or fault of the defendant, if any, with the
19 negligence or fault of the plaintiff, if any. So how do
20 you make this comparison? You do it in a very simple way
21 by using percentages based on a 100 percent total. If you
22 believe both parties were at fault and each party's fault
23 was the proximate cause of any injuries or damages that Mr.
24 Hogan suffered, you then decide or compare the party's
25 fault.

00261

1 By way of example, you may decide that one party
2 was 30 percent at fault and the other 70 percent. You may
3 decide one party was 90 percent at fault; the other 10
4 percent or you may decide they were 50 percent at fault.
5 You may decide that one was a 100 percent and the other 0
6 percent. So what you're doing then is considering the
7 conduct of the parties as a whole and measuring each side's
8 contribution to the loss using percentages. In determining
9 whether the plaintiff was comparatively negligent, the
10 defendant bears the burden of proof. That is the
11 defendant, Corder and Sons Incorporated, must prove by the
12 greater weight of the evidence that Mr. Hogan was negligent
13 and that his negligence was the proximate cause of his own
14 damages. Please remember the plaintiff's negligence, if
15 any, must have contributed proximately to the injury. If
16 you find the plaintiff was negligent, but his own
17 negligence was remote and did not proximately cause his
18 injury, then the law of comparative negligence does not
19 apply.

20 Likewise, you're only to consider the conduct of
21 the party's in allocating percentages. You may not
22 consider the action of others who are not parties to the
23 case. Of course, you may decide that the plaintiff was not
24 at fault at all and remember I'm not suggesting that
25 comparative negligence does or does not apply in this case

00262

1 or if it does apply the proper amount of liability to be
2 apportioned between the parties. Whatever you decide,
3 please remember the percentage must equal 100 percent and
4 that is for you and you alone to decide as finders of the
5 facts. I'm merely providing you with the percentages by
6 way of example.

7 Now to put this in context, and because based on my
8 experience, it's sometimes difficult to communicate, I'm
9 going to ask you to give each juror one of those, please,
10 sir. This is the verdict form. I'm going to go over it
11 with you so you can kind of understand how comparative
12 negligence works if you decide it applies.

13 (The bailiff passed out copies of the verdict
14 form.)

15 THE COURT: Everybody got one? Okay. So let's
16 just go through this under several different scenarios and
17 again, I'm not suggesting of course which scenario you
18 should use; that's entirely up to you, but these are just
19 suggestions in a sense of how the verdict form works.

20 The first question: Was the defendant negligent?
21 If you answer that question no; that's the end of your
22 deliberations. Okay. If you answer it yes, however, you
23 go to question 2.

24 Two: Was the defendant's negligence the proximate
25 cause of the plaintiff's injuries? If you answer that no,

1 again, you -- you're through with your deliberations
2 because the plaintiff would not have carried his burden of
3 proof on proximate cause. But if you answered that
4 question yes and find the plaintiff has carried his burden
5 of proof, then you go to question 3 and this is where you
6 determine whether Mr. Hogan was negligent.

7 If you say yes, he was negligent as well, you go to
8 question 4 and see if the defendant also proved that Mr.
9 Hogan's negligence proximately caused his own injuries. If
10 you answered that yes as well; you go to question 5 and
11 that's where you compare the negligence and use the
12 percentages. So if you answered for example, one party 10
13 percent; the other party 90 percent, they have to total up
14 to a 100, then you'd go to question 6. And if the
15 plaintiff's negligence was greater than 50 percent, again,
16 you would stop your deliberations. But if it was not,
17 you'd go to question 7 where you state the amount of
18 damages.

19 Now, it's very important if you use comparative
20 negligence and find that it applies, that you not discount
21 the damages by your percentages. We're not going make you
22 do any kind of math. Okay. So you have to find the total
23 amount of damages and then we'll reduce it based on your
24 percentages at a later time. So that's one scenario. You
25 could also find that comparative negligence doesn't apply

1 at all and then for instance you could find that when you
2 answered question Number 1 is yes and you go to question 2
3 and answer that yes, that the negligence was the proximate
4 cause of Mr. Hogan's injuries and then when you get to
5 question 3, you could say no, Mr. Hogan was not negligent
6 whatsoever.

7 You would go to question 7 where again you
8 determine his damages. Likewise, you could get to question
9 7 without having to go through questions 5 or 6 if you
10 found that Mr. Hogan was negligent but his negligence was
11 not the proximate cause of his injuries.

12 So that's how that works and you see that there is
13 a blank on the verdict form for punitive damages.

14 I will tell you that punitive damages can be
15 considered by you if you award actual damages. Punitive
16 damages are intended to punish a defendant for
17 extraordinary and outrageous misconduct and to deter
18 defendant and others from committing similar acts in the
19 future. Punitive damages can only be awarded when the
20 defendant's conduct has amounted to more than mere
21 negligence. The evidence must establish that the
22 defendant's actions were reckless, willful, and wanton,
23 meaning there was a conscious failure to exercise due care
24 or a conscious indifference to or reckless disregard of the
25 rights and safety of others.

1 Recklessness means a conscious failure to use
2 reasonable care and a person who is negligent acts
3 carelessly. A person who acts recklessly, willfully, and
4 wantonly is not only careless, but is aware that he's being
5 careless. If you find the defendant's conduct was willful,
6 wanton, or reckless, you may award punitive damages.

7 To support such an award, the plaintiff must prove
8 by clear and convincing evidence that the conduct included
9 a consciousness or of wrongdoing when it occurred. Clear
10 and convincing proof leaves no substantial doubt in your
11 mind. It means the evidence is not ambiguous, doubtful,
12 equivocal or contrary.

13 Convincing means persuading by proof of argument,
14 causing one to believe in the truth of what is asserted.
15 Clear and convincing proof establishes not only that a fact
16 is probable, but it is highly probable.

17 Now, before awarding punitive damages, you must
18 consider and weigh four elements that may be pertinent to
19 the facts. First, the degree of reprehensibility of the
20 defendant's conduct. You should consider whether the harm
21 caused was physical as opposed to economic, whether the
22 conduct demonstrated an indifference to or a reckless
23 disregard for the health or safety of others, the target of
24 the conduct, whether the target of the conduct had
25 financial vulnerability, whether the conduct involved

1 repeated actions or was an isolated incident; whether the
2 harm was the result of intentional malice, trickery or
3 deceit rather than a mere accident; and the likelihood the
4 accident would deter the defendant or others from like
5 conduct.

6 Any punitive damage award should bear a reasonable
7 relationship to the nature and extent of the conduct and
8 harm caused including the actual damages you have awarded.
9 Second, the punitive damage award must take into account as
10 a mitigating factor any other award or penalty that may be
11 imposed for the conduct involved.

12 Third, the award of punitive damages must be rendered a
13 punishment and the defendant's ability to pay should be
14 considered and economic bankruptcy, however, is not an
15 absolute bar to an award of punitive damages.

16 Fourth and finally, punitive damages can only be
17 awarded for injuries the defendant caused to the parties in
18 this action. Potential harm to others is not something you
19 can lump into your award. It may be appropriate to
20 consider the reasonableness of a punitive damages award and
21 the potential harm of the defendant's conduct could have
22 caused, but that potential harm is the harm potentially
23 caused to the plaintiff. So that's the law about punitive
24 damages.

25 So you don't serve as jurors, ladies and gentlemen,

1 to be partisans and advocates for either side. You were
2 chosen because both sides believed you could fair and
3 impartial and you are judges, judges of the facts, and your
4 sole interest is to determine what the facts are, take the
5 law I just gave you and apply it to those facts and
6 ultimately reach a verdict.

7 Now I'm not going to hold you up any more except to
8 tell you that the record's closed. You'll get the exhibits
9 back there in just a minute. That will be your signal you
10 can start deliberating. But they're not going to be any
11 more exhibits other than what you get back there. You'll
12 have to rely on your memory of the testimony. There's not
13 going to be any more witnesses. So I know you'll
14 deliberate conscientiously and courteously and thank you
15 for your attention to me.

16 Don't start talking about the case until you get
17 the exhibits because I have to take -- believe it or not,
18 for as long as I've been talking -- I might have left
19 something out and they'll be sure to tell me if I did.

20 So thank you very much for your patience and if
21 you'll give me that; you keep that and everybody else give
22 your verdict forms. Just leave them one back there. Thank
23 you.

24 (The jury left the courtroom at 4:47 p.m.)

25 THE COURT: Thank you. All right. Any objection

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1 or exception to the charge?

2 MR. BUNCE: Nothing further, Your Honor.

3 MR. HENDRIX: Your Honor, the only problem I had
4 with the charge is when you charged the comparative
5 negligence there was a point where you said that you might
6 not, and of course this is not a quote, you might not find
7 that the plaintiff was negligent at all. I wanted you to
8 say also and at the same time, you might not find that the
9 defendant was negligent at all and that was not included
10 and I kind of wish -- would ask you to make sure that
11 that's -- cuts both ways. I can't remember the exact
12 words --

13 THE COURT: Okay.

14 MR. HENDRIX: -- but it was something like that.

15 THE COURT: Yes, sir. Let me see here. I
16 certainly didn't mean to emphasize that. I thought the
17 charge as a whole, if I read it like I have it typed out
18 here, I said if the defendant denies any wrongdoing, any
19 negligence or wrongdoing of any kind and denies any legal
20 responsibility for the damages, but he also, the defendant
21 also claims the plaintiff was at fault.

22 MR. HENDRIX: Yes, sir, you read all that.

23 THE COURT: Is an alternative.

24 MR. HENDRIX: Yes, sir.

25 THE COURT: So --

1 THE COURT: Thank you for making that suggestion.
2 I think it's an improvement to my comparative negligence
3 charge. Any other objections to the charge?

4 MR. HENDRIX: No, Your Honor.

5 MR. BUNCE: None from the Plaintiff, Your Honor.

6 (The attorneys were going through the exhibits.)

7 (The Court released the alternate juror.)

8 THE COURT REPORTER: We're ready.

9 (The jury began deliberations at 5 o'clock p.m.)

10 (The jury sent a note out to the Court.)

11 JURY QUESTION

12 THE COURT: We got a note from the jury. It says
13 we need a calculator.

14 THE CLERK: I've got one.

15 (A calculator was sent in to the jury.)

16 THE COURT REPORTER: You want me to mark that as an
17 exhibit?

18 THE COURT: Yes, ma'am.

19 (Court's Exhibit Number 10 was marked for the
20 record.)

21 (It was reported to the Court that a verdict was
22 reached at 6:14 p.m.)

23 (The jury entered the courtroom at 6:37 p.m.)

24 VERDICT

25 THE COURT: Okay. Mr. Powell, has the jury reached



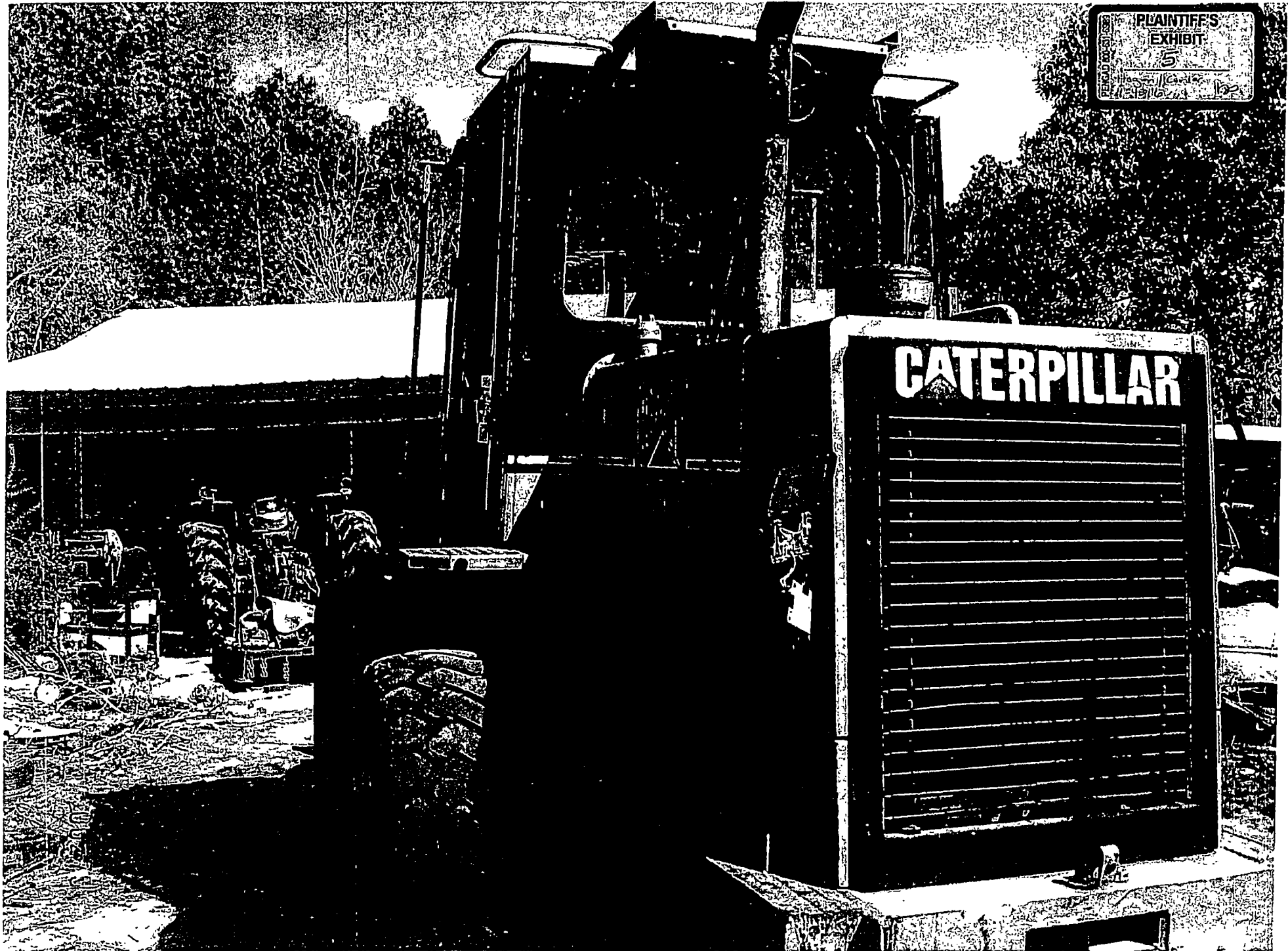


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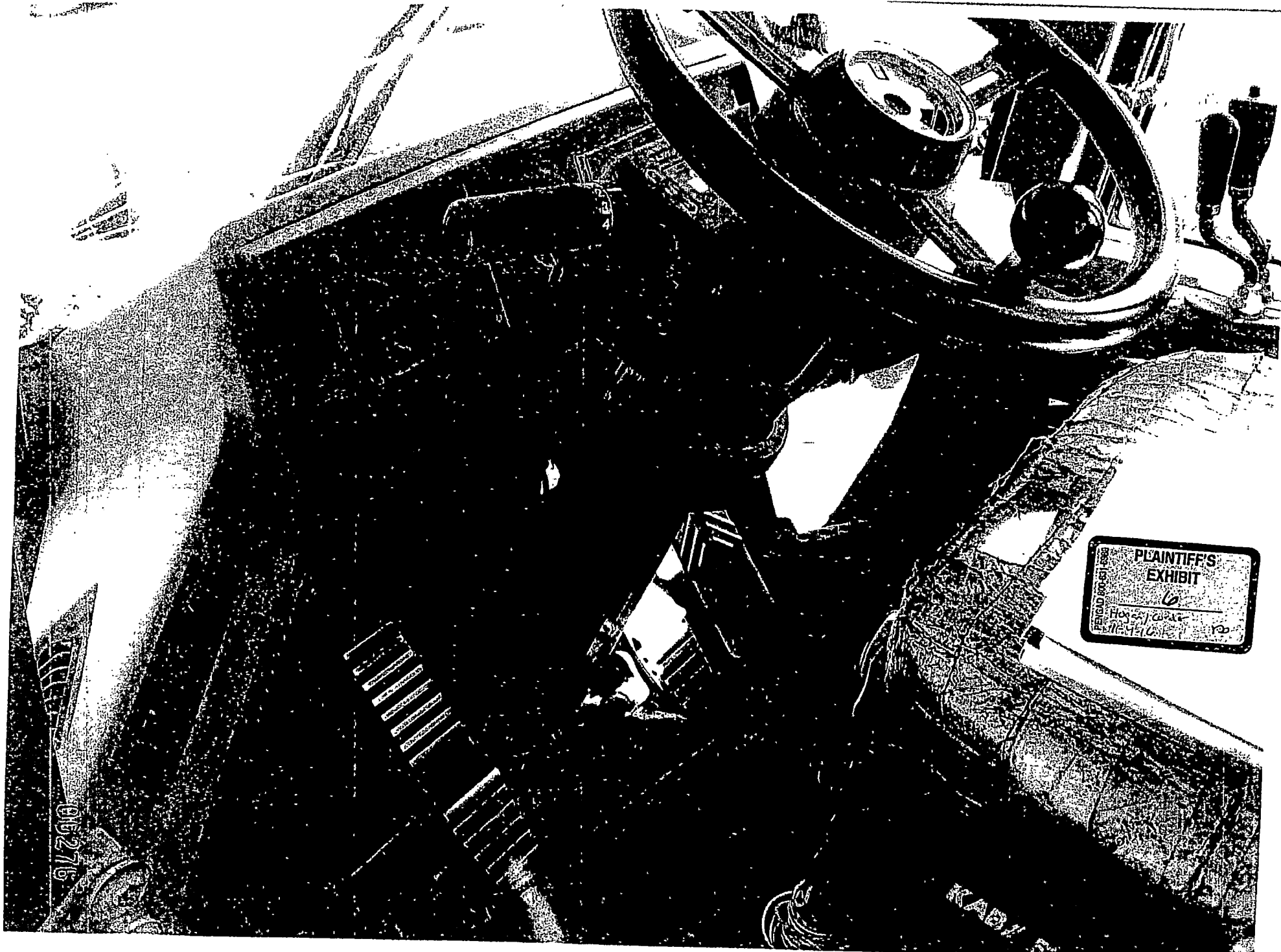


PLAINTIFF'S
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J. Edgar Hoover
FBI





PLAINTIFF'S
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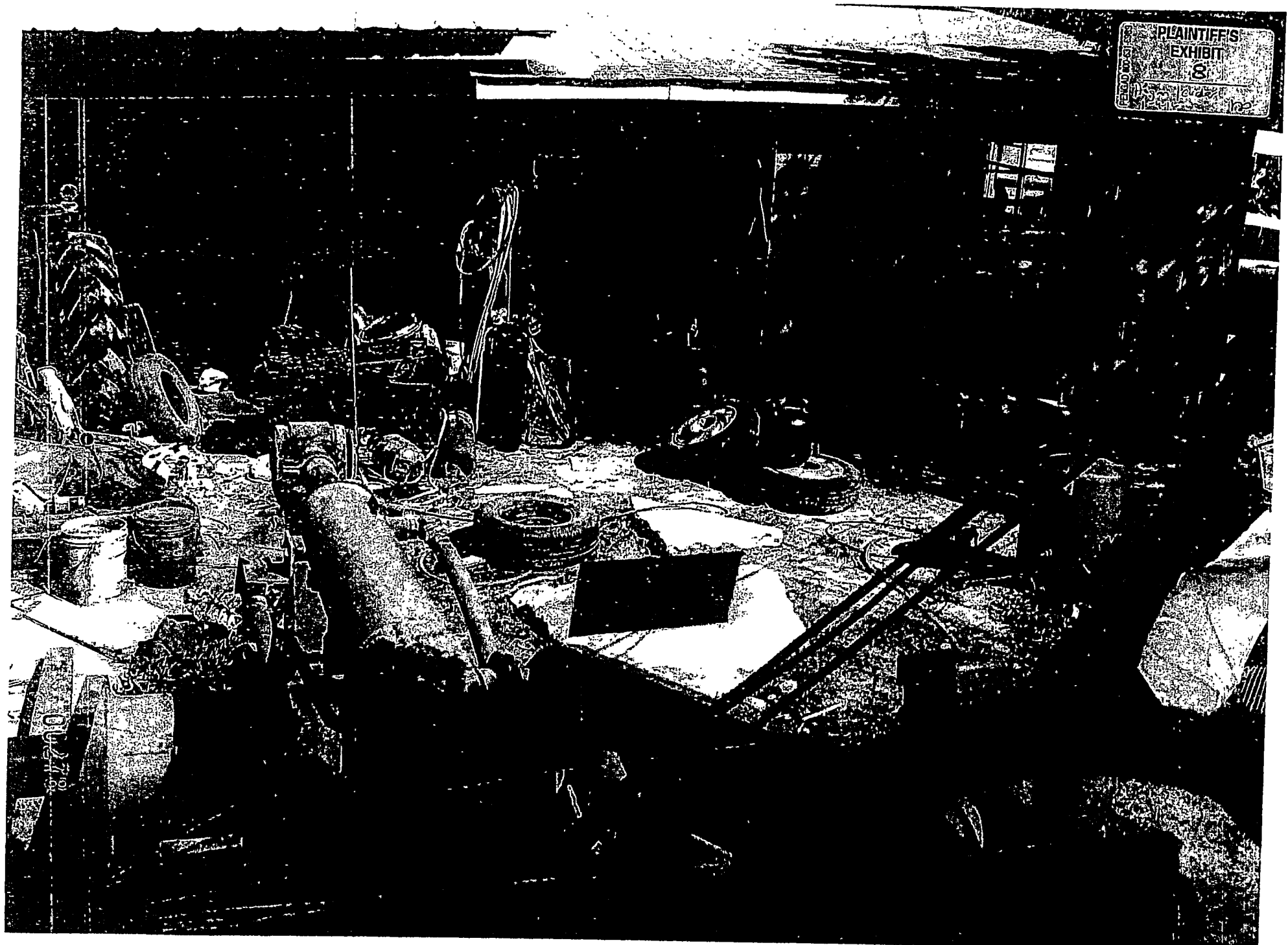
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Hogson, Charles
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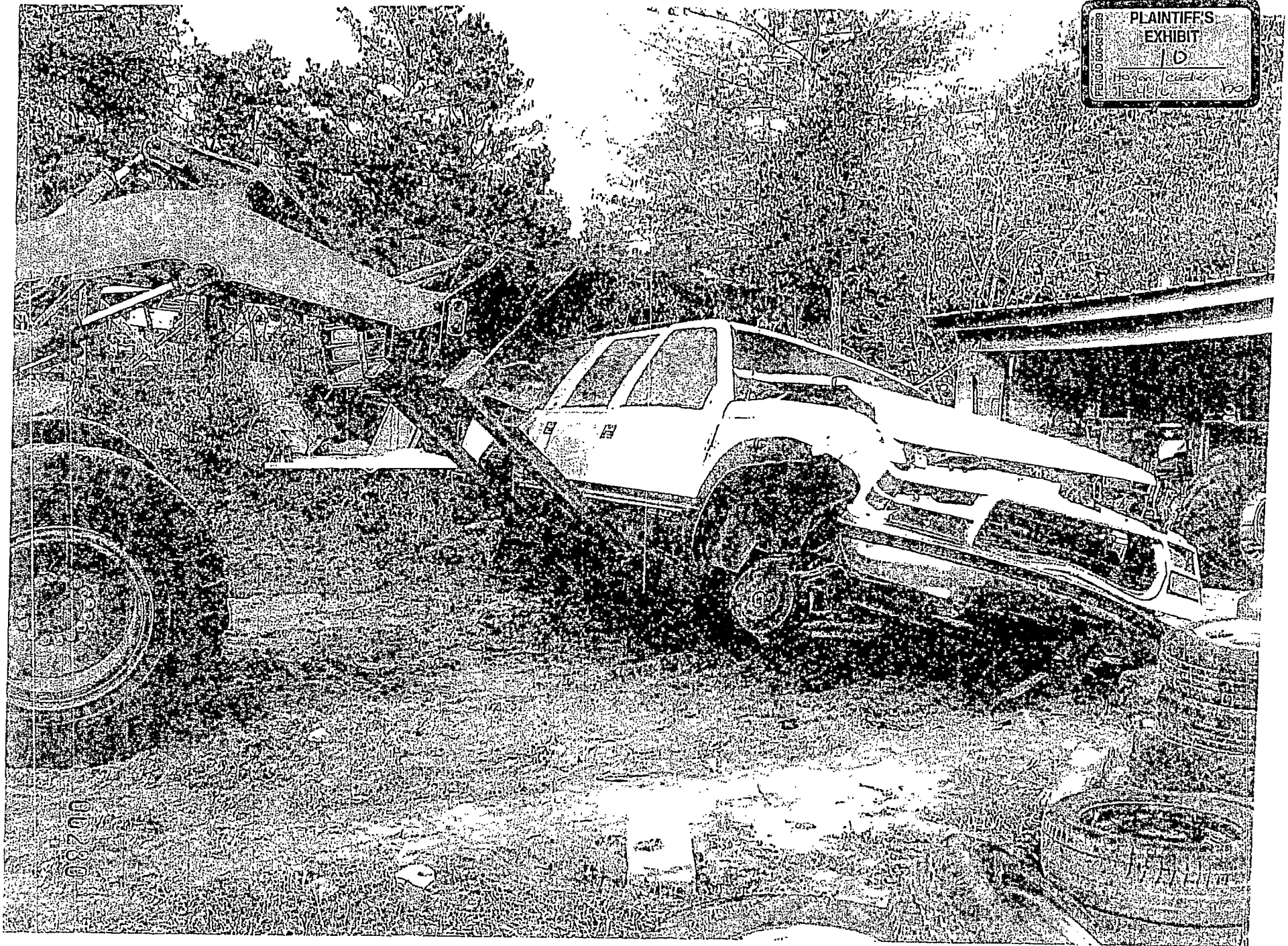
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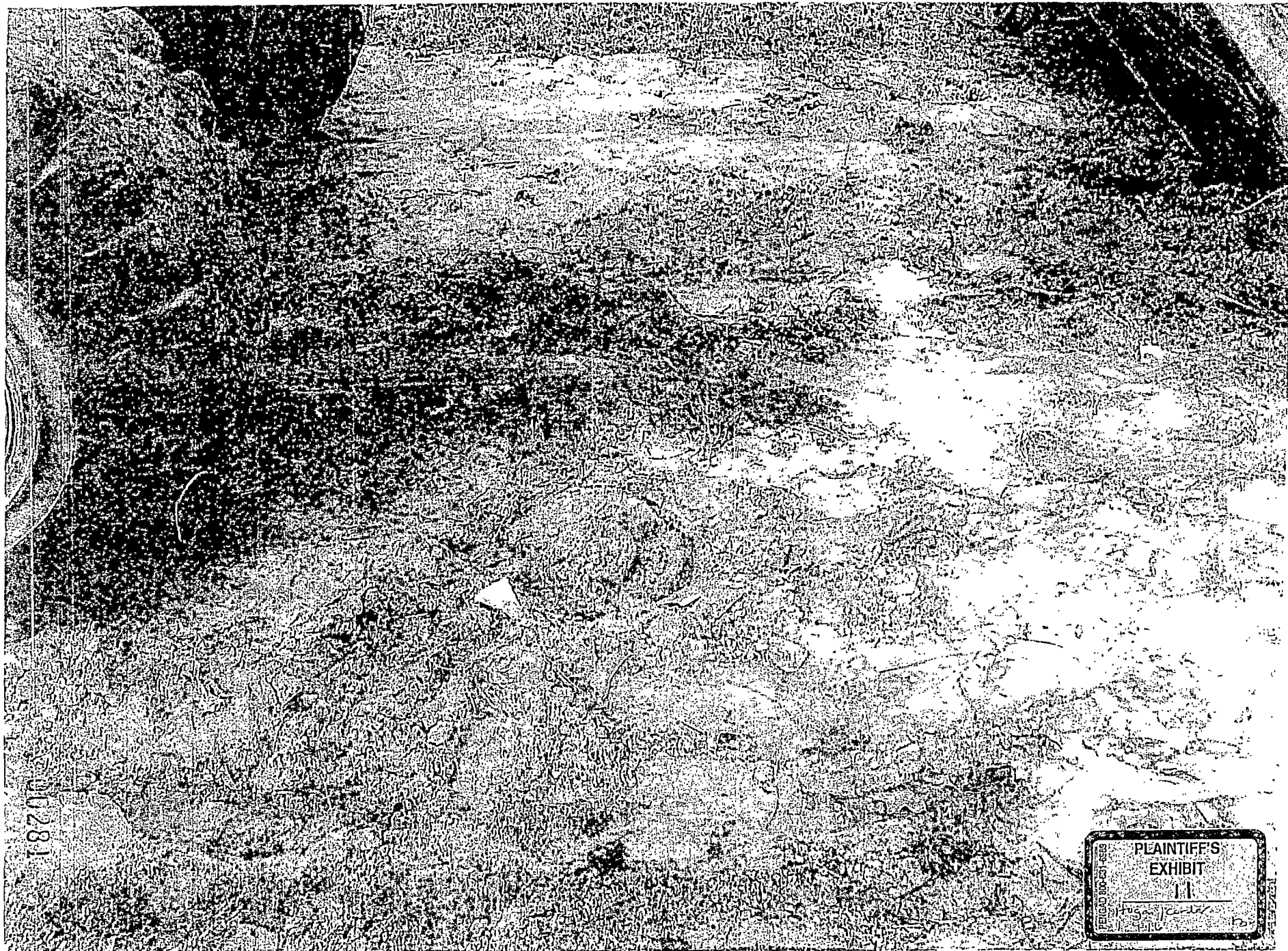


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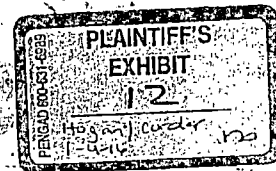


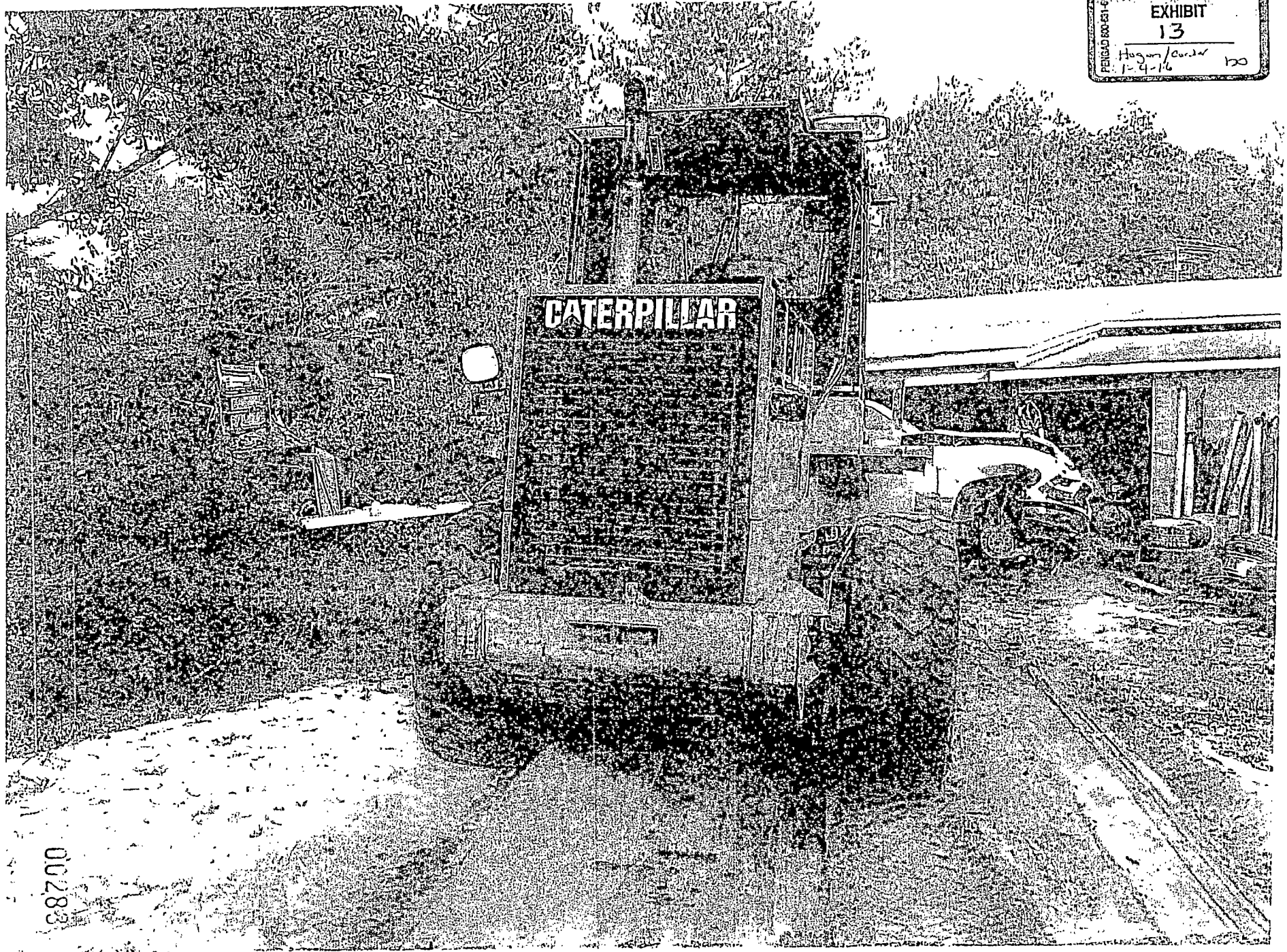


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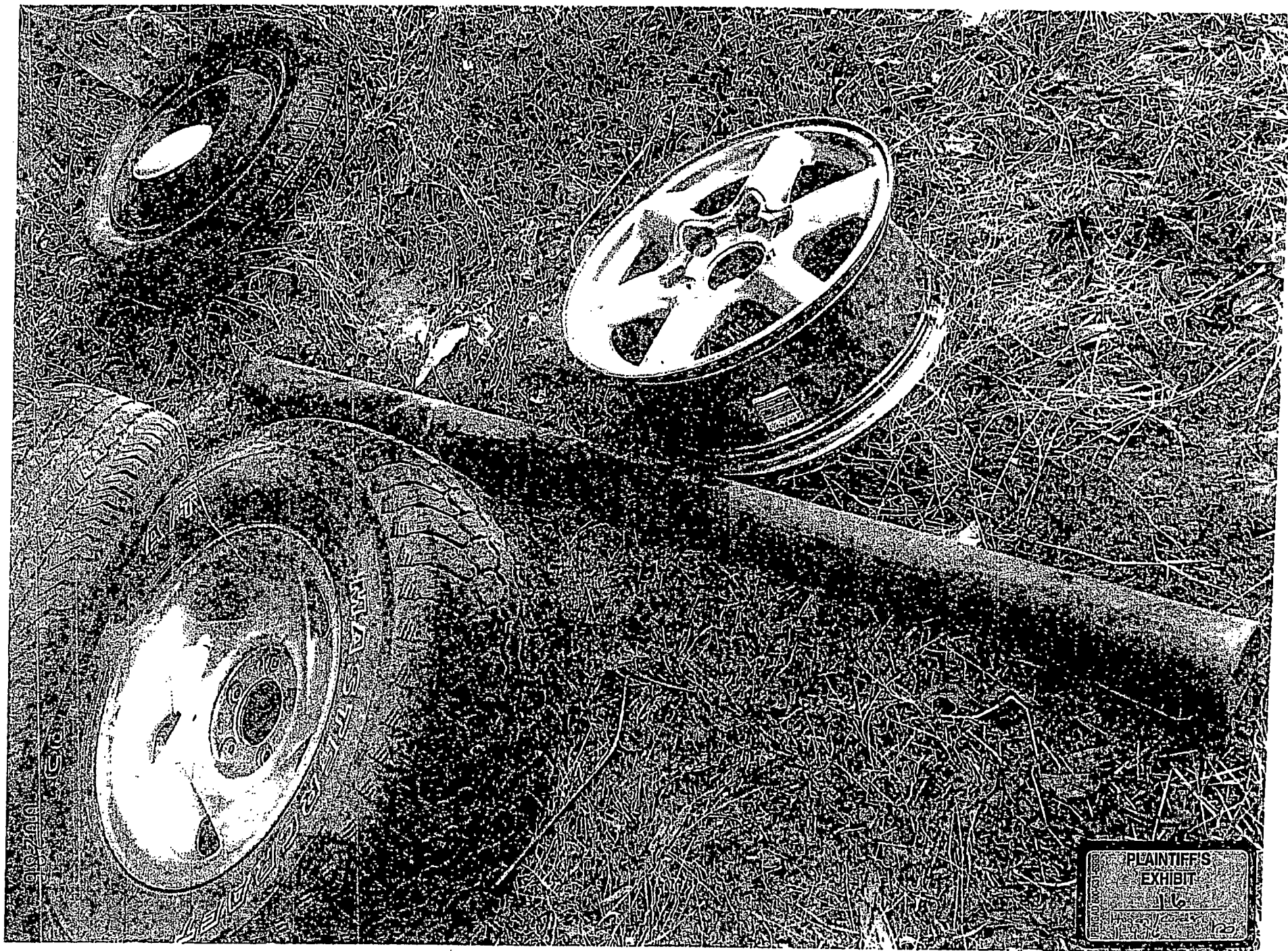




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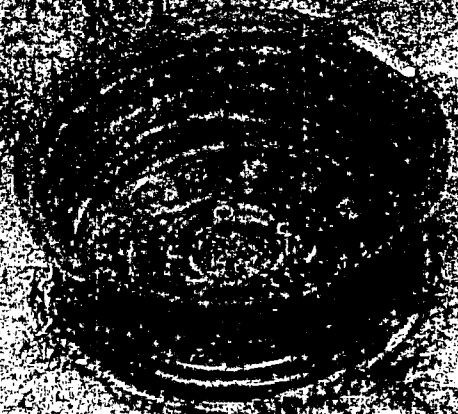
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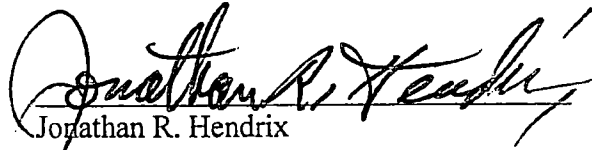
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I hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 16, 2016



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SC Court of Appeals

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appeal Case No. 2016-000259

Jerry Hogan Respondent.

v.

Corder & Sons, Inc. Appellant

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Was there presented evidence, other than conjecture and/or speculation, as to why the sports utility vehicle being held up by the front-end loader “suddenly fell” which was sufficient to justify denying Appellant’s motions for directed verdict and for judgment notwithstanding and verdict?
2. Was there presented any evidence which rose above conjecture and/or speculation that there was any failure on the part of the front-end loader holding up the sports utility vehicle while Respondent worked under it?
3. Was there presented any evidence as to why the sports utility vehicle “suddenly fell” and, consequently, resulted in injuries to the Respondent for which Appellant was responsible?
4. Did the jury improperly rely upon conjecture, speculation and the doctrine of *res ipsa loquitur* in finding that the Appellant was liable for Respondent’s injuries?

STATEMENT OF ISSUE ON APPEAL **(Encompassing All Questions Presented)**

The sole issue on appeal is whether the trial court erred in denying Appellant, Corder & Sons, Inc.’s (“Corder”), motions for directed verdict and for judgment notwithstanding the verdict at the appropriate stages of the proceedings. The Respondent failed to put forth any evidence which rose above conjecture and speculation as to why the sports utility vehicle being held by a front-end loader, capable of holding three times the weight of the sports utility vehicle, “suddenly fell.” Therefore, there was insufficient proof that any negligence on Defendant’s part caused Respondent’s injuries.

STATEMENT OF THE CASE

This suit arose out of Respondent Hogan's allegations that he was injured on or about February 18, 2011, while working at Appellant's salvage yard near the Town of Leesville in Lexington County, South Carolina. In Respondent's Complaint, Respondent alleged that "suddenly and without" warning the sports utility vehicle fell directly on the Plaintiff [Respondent] from above, resulting in significant physical injury to the Plaintiff. (Complaint, paragraph 11). The Complaint, in paragraph 15, made some allegations of negligence of the Appellant. The Complaint, however, did not make any specific allegations of negligence attributable to Appellant concerning what caused or started the chain of events resulting in the injury to the Respondent. Respondent did not offer any proof at trial as to what caused the loader to fail to "hold" the load in the air and off of Respondent. Rather, Respondent claimed that a secondary safety device or "system" (a mobile home axle placed under one of the loader's forks) was inadequate and that Appellant should be held liable because of this alleged inadequacy even though Respondent failed to prove why the loader failed to safely hold the sports utility vehicle in the first place. The Appellant, in its Answer, denied negligence. Appellant timely moved for a directed verdict in its favor at the end of the Respondent's case and, again, at the end of Appellant's case. The case was submitted to a jury and the jury returned a verdict in favor of Respondent in the amount of \$864,341.80.

Following the discharge of the jury, the Appellant requested ten (10) days to file post-trial motions and this was granted. Appellant timely filed its motions and these were denied by the Trial Judge who signed an order on January 19, 2016, which was filed with the court on January 22, 2016. The Appellant timely filed this appeal on or about February 10, 2016.

STATEMENT OF FACTS

The Respondent, Jerry Hogan, had been employed at Appellant's salvage yard for several months prior to the accident which occurred on or about February 18, 2011. He had worked for the Appellant at yet another time in the past when the salvage yard was run by Robert James "Bubba" Corder, the son of James Corder. (R p. 64 L. 7 - 18, p. 220 L. 10 - 12). At some time in the past, "Bubba" Corder had seen, at other salvage yards, workers using a steel pipe or "pole" under the fork of a front-end loader as a secondary, backup safety device to help ensure that no load being held up by the front-end loader would fall if the loader failed. (R p. 221 L. 25 to p. 222 L. 12). The uncontradicted evidence at trial was that there were no problems with the front-end loader giving way or failing at any time before Mr. Hogan's injury occurred or at any time afterwards. (R p. 56 L. 13 - 18, p. 223 L. 16 to p. 224 L. 5). Likewise, the secondary safety device (the axle) had never failed at any time. (R p. 222 L. 14 - 19).

Mr. James Corder testified that, on the day of the accident, Mr. Hogan was not supposed to be there when the accident occurred (R p. 28 L. 12 - 15, p. 39 L. 14 to p. 40 L. 9) and that Mr. Hogan knew how to run the equipment himself. (R p. 27) L. 6 - 10). Mr. Corder testified that he did not bring any vehicle down to the shop himself. He paid Mr. Hogan at noon at Mr. Hogan's specific request. (R p. 48 L. 1 - 6). The only persons present at the salvage yard that day at the time of the accident were Mr. Corder, two ladies sitting with him in the "office" and Mr. Hogan. Mr. Corder was inside with the ladies and thought Mr. Hogan had left. The "setting" of the pole under the forks of the front-end loader was usually done by two persons (R p. 58 L. 9 - 22). Mr. Hogan, apparently, attempted to do that job himself without Mr. Corder's knowledge or consent. (R p. 58 L. 24 - 25).

The Respondent's expert admitted that he was not an expert with respect to front-end loaders. (R p. 58 L. 25 to p. 59 L. 3). Appellant's expert, who was stipulated by Respondent to be an expert as to the front-end loader (R p. 197 L. 9 - 14) testified that the front-end loader was capable of lifting and holding in the air, indefinitely, three times the weight of the sports utility vehicle. (R p. 200 L. 5 to p. 202 L. 13). Respondent Hogan testified that he saw no evidence that the sports utility vehicle was not properly mounted on the loader and doesn't know what caused it to fall; that no hydraulic lines had been broken; no metal on the forks had broken or given way. He saw no evidence that anything broke except that he says "it came down". (R p. 88 L. 2 to p. 89 L. 11).

Natasha Smith was called as a witness by Mr. Hogan and testified that she heard machinery "moving around in the salvage yard" while she and her mother were inside the shop talking to Mr. Corder. Whoever was moving the equipment just before the accident could not have been Mr. Corder. (R p. 100 L. 1 to p. 102 L. 8) Ms. Smith estimated that she heard the machine running approximately 20 minutes before Mr. Hogan called out for help. (R p. 101 L. 21 to p. 102 L. 3).

Mr. Hogan's expert, Stephen Fournier, testified that he did not know what caused the front-end loader to let the sports utility vehicle tilt and slide down. (R p. 149 L. 6 -12). Mr. Fournier had no criticism of the front-end loader being used for the purpose of lifting the sports utility vehicle load off the ground and stated that it should be capable of lifting and holding the load if it is in good working order. (R p. 153 L. 6 - 14). Mr. Fournier also admitted that the loader was one system to make sure the load didn't fall. R p. 153 L. 15 - 22). He also testified that, based upon the information available to him, "most likely" Mr. Hogan was the operator who

set the machine up. (R p. 157 L. 7 - 12). Mr. Fournier further testified that before the “secondary” safety measure of the mobile home axle would come into play, there would first have to be something or someone to cause the weight of the sports utility vehicle (perhaps even the force of the machine) to be applied to the axle. Mr. Fournier did not know what, if anything, happened to cause that to occur. (R p. 158 L. 13 - 14).

Respondent’s expert also admitted that the secondary safety devise (the axle) would not come into use unless and until the first one (i.e., the front-end loader) failed. (R p. 158 L. 15 - 24). Respondent’s expert went on to say: “if the machine had held, I guess it [the accident] would not have happened....” (R p. 159 L. 4 - 17) (bracketed language supplied).

Corder’s expert, Chad Reeves, was stipulated to be an expert on the Caterpillar front-end loader by the Respondent. (R p. 197 L. 9 - 13). Mr. Reeves’ testified that the only way the front-end loader would “fail” and suddenly let the load down would either be because of a catastrophic failure of a hydraulic cylinder or hose or through human error. (R p. 199 L. 24 to p. 200 L. 6). If the cylinder or hose had failed, there would have been “oil,” or hydraulic fluid, everywhere at the scene. Approximately five to ten gallons of oil or hydraulic fluid would have spewed on the loader and the ground. (R p. 200 L. 15 to p. 201 L. 9). No one testified that this type of leakage occurred.

Mr. Reeves also testified that, without evidence of five to ten gallons of hydraulic fluid or “oil” on the ground and on the machine, there was no evidence of any problem with the machine which would have caused a sudden release of the load (the sports utility vehicle) from the lifting capability of the front-end loader. (R p. 200 L. 15 to p. 201 L. 9). The only other way for the front-end loader to have let the weight down would have been for someone to manually move the

controls for the lifting arms and the forks. (R p. 201 L. 10 - 13). The loader was strong enough to lift and support 15,000 pounds which is approximately three times the weight of the sports utility vehicle it was holding at the time of Mr. Hogan's injury. (R p. 201 L. 24, p. 202 L. 8). The machine was strong enough to press down with that same amount of force and, by using the "tilt" control, cause the post or axle to fail. (R p. 201 L. 24 to p. 202 L. 8). The loader was also strong enough to cause the failure of two such pipes, one under each of the forks. (R p. 203 L. 11 - 16). The loader was also strong enough to press the axle into the ground. (R p. 211 L. 2 - 5).

Appellant's expert also testified that, if there had been a mechanical failure of this machine, the entire lifting system would have failed. (R p. 203 L. 10 - 13). If the tilt, lift/lower controls had been manipulated and had caused a failure of the pipe or axle, the failure would have been instant and the SUV would not have sat there suspended for anytime after it was set up. (R p. 205 L. 20 to p. 206 L. 5). Without a mechanical failure of the machine itself, the front-end loader would have stayed there until someone moved it. (R p. 206 L. 14 - 20). The loader would have held up the sports utility vehicle after the controls were used to set it on the pole and would stay there after the controls were no longer being used and would continue to do so even if the machine itself were completely "cut-off." (R p. 214 L. 2 - 3). In other words, the front-end loader, by itself, would prevent this accident from happening.

Mr. Hogan offered no evidence as to what caused any alleged "failure" of the front-end loader to hold the sports utility vehicle other than conjecture or speculation. Essentially, the true cause of this accident is unknown as there is no dispute that this equipment was more than capable of handling the job which Mr. Hogan intended to do. Appellant cannot be held accountable or deemed to have been negligent in this case. Appellant cannot take steps to protect

itself against something that was clearly not foreseeable and which has not been explained. Appellant did take steps to protect the operators of the equipment from what was reasonably foreseeable. The secondary system in place was designed to protect against accidents caused by loader failure. No qualified witness has said Appellant had a duty to guarantee that no mishap could occur from any and all loader misuse in addition to protecting against possible loader failure.

The evidence in this record is that the loader did not fail. There is no evidence that the cause of the loader not safely holding the sports utility vehicle due to any negligence on the part of Appellant. The system in place was reasonably designed to protect against foreseeable accidents. The only person in the vicinity of this machine when the accident occurred was Mr. Hogan. The evidence makes it clear that only Respondent was in a position to have caused a "human error" failure.

While it is unfortunate that Mr. Hogan suffered serious injuries, the only reasonable conclusion is that he operated the machine inappropriately in some fashion. It is clear from the testimony of the witnesses that the machine did not fail. Mr. Hogan's expert had no explanation as to why this accident occurred in the first place. He found no fault in the safety measures in place on the front-end loader. Mr. Fournier had no criticism of the loader being used for the purpose it was being used at the time of Mr. Hogan's injury. The fact that Mr. Hogan was injured did not mean that, without more, there was negligence on the part of Corder. There is no evidence that the first safety system in place failed and, although the Respondent's expert was critical of the secondary safety system in place, the secondary safety measure did not by itself cause the accident. It is axiomatic that the secondary safety measure could not come into "play"

unless the first failed and it did not fail.

What happened here and what caused the Respondent to be seriously injured was never established by the evidence presented. There is also no proof it was caused by the negligence of the Appellant.

ARGUMENT

Because Mr. Hogan failed to put forth any direct or circumstantial evidence to prove why the front-end loader failed to hold the sports utility vehicle and to prove that such failure was foreseeable and the result of Appellant's negligence, the Court erred in denying Corder's motions for directed verdict and judgment notwithstanding the verdict.

I. Standard of Review

On a motion for directed verdict by the defendant, the testimony must be viewed in a light most favorable to the plaintiff. However, if the only reasonable inference to be drawn from all the testimony is that the plaintiff has failed to make out his case against the defendant, then it is the duty of the trial judge to direct a verdict against the plaintiff. Owens v. South Carolina State Highway Dept., 239 S.C. 44, 56-57, 121 S.E.2d 240, 247 (1961).

South Carolina has always refused to adopt the doctrine of *res ipsa loquitur*:

"In this State it is well settled that the burden rests upon the party to prove negligence. This burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence, Gilland v. Peter's Dry Cleaning, Co., 195 S.C. 417, 11 S.E.2d 857; Perry v. Carolina Theater, 180 S.C. 130, 185 S.E. 184. In order, therefore, for a plaintiff to recover damages, she must prove by the greater weight or preponderance of the evidence

not only the injury but also that it was caused by the actionable negligence of the defendant.” King v. J.C. Penney Co., 238 S.C. 336, 339-40, 120 S.E.2d 229, 229, 230 (1961).

“Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” Baughman v. AT&T Co., 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) [emphasis supplied]. Our courts are simply not permitted to leave the question or whether misfortune was a result of negligence to mere conjecture or speculation. Fletcher v. Medical University, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010).

Our Supreme Court in Marchant v. Mitchell Distributing Co., 270 S.C. 29, 240 S.E.2d 511 (1977) recognized: “Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed.” Bragg v. High Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (1995); Marchant v. Mitchell Distributing Co., 270 S.C. 29, 240 S.E.2d 511 (1977).

Those cases were products liability cases but the same theory should apply here. Appellant provided a secondary, additional safety device or “system” in the form of the steel axle. Respondent’s expert criticized it for not being good enough, saying that it could have been better. A critical question not answered by the evidence is “How good should it have been;” or, put another way, “Exactly what was the risk which Appellant should have foreseen and prevented?” Respondent has taken the position that Appellant should have devised a secondary system which would have guaranteed Respondent’s safety. Appellant submits that it cannot be held liable unless the safety system in place is proven to be unreasonable under the

circumstances. The Court system should not impose upon Appellant the unreasonable burden of guaranteeing a worker's safety regardless of whatever unexplained occurrence caused the machine to partially tilt and the sports utility vehicle to slide down the forks. While it might be reasonable to say Appellant should have foreseen a "loader failure" and guarded against that, it is an entirely different matter to say Appellant must have taken steps to protect against an unanticipated misuse of the loader or other unknown, unanticipated cause. The loader's 15,000 pound downward thrust capability and the forks' simultaneous tilt capability are not hazards one should reasonably expect in this situation. Appellant submits that is not a hazard one should have to design a secondary safety system which could guarantee that no harm could result from such misuse.

"A negligent act or omission is a proximate cause of injury if, in a natural and continuing sequence of events, it produces the injury, and without it, the injury would not have occurred." Shepard v. South Carolina Department of Corrections, 299 S.C. 370, 385 S.E.2d 35 (Ct. App. 1989). Where the injury complained of is not reasonably foreseeable, there is no liability. Woody v. South Carolina Power Co., 202 S.C. 73, 24 S.E.2d 121 (1943). One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the Defendant's negligent act, *id.* "Foreseeability is to be judged from the perspective of the Defendant at the time of the negligent act, not after the injury has occurred. Shepard v. South Carolina Department of Corrections, *supra.*" Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (1989).

Under the law, the Respondent, Jerry Hogan, had the burden of presenting sufficient evidence from which a jury could reasonably infer (without resorting to conjecture or

speculation) that his injuries were caused by a specific act or omission of the Appellant.

Respondent must prove Appellant had either created a dangerous condition or that Appellant had knowledge of a dangerous condition and failed to correct it. As applied to the specific facts of this case, Mr. Hogan had the burden of establishing evidence that some negligence of the Appellant caused his injuries, without which the injuries would not have occurred.

At trial, Mr. Hogan relied purely upon conjecture and speculation and failed to put forth any evidence from which a jury could determine or infer what, besides some action of his own, caused the front-end loader to "release" its holding of the load of the sports utility vehicle up in the air which ultimately resulted in an injury to Mr. Hogan.

The evidence in the record makes it clear that there were two distinct "safety systems" utilized at Appellant's salvage yard to ensure safety of anyone who was working under a load. The first was the loader itself. The evidence is clear that the loader was more than capable of holding up the weight of the sports utility vehicle. In fact, it could hold the weight of approximately three sports utility vehicles in the air indefinitely. There is no contest about this.

Mr. Hogan has offered no explanation as to why the load was released by the sports utility vehicle. The uncontradicted evidence in the record is that there was no "failure" of the front-end loader which caused the load to be released. (R p. 201 L. 6 - 7, p. 205 L. 3 - 4). As Defendant's expert, Chad Reeves, testified, the only other option was that someone would have had to have worked the tilt handles on the front-end loader and that any "failure" there would have happened instantly. (R p. 201 L. 10 - 13).

Since there was absolutely no failure proven on the part of the front-end loader, there is no proof that any "hazard" actually happened in this case and which could have reasonably been

guarded against or which should have been foreseen by the Appellant. No one who testified had any idea why the forks of the front-end loader failed to hold the load.

“Proximate cause requires proof of causation in fact and legal cause.” Rife v. Hitachi Const. Mach. Co., Ltd., 363 S.C. 209, 215, 609 S.E.2d 565, 569 (Ct. App. 2005) “Causation in fact is proved by establishing the injury would not have occurred ‘but for’ the defendant’s negligence.” Rife v. Hitachi Const. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). “Legal cause is proved by establishing foreseeability.”

The primary safety mechanism is the loader’s unquestioned ability to adequately and safely hold the load of the sports utility vehicle. It did not fail. There is no explanation in the evidence for how this accident occurred. There is only conjecture and speculation and that is not enough to support a finding against the Appellant herein of negligence. Mr. Hogan must prove something that the Appellant failed to do that he should have done or something that he did and should not have done which caused Respondent’s injuries. Otherwise, Appellant should not be held at fault.

Respondent’s theory seems to be the very definition of *res ipsa loquitur*. “Something happened (we don’t know what), therefore the secondary system failed, therefore the Defendant must be liable.” This type of evidence is not enough to establish liability in the State of South Carolina. There was no contention at trial that the front-end loader had ever failed before the accident or after the accident. There was no physical evidence that it failed at the time of this accident. According to Chad Reeves, the only expert regarding the front end loader who testified at trial, there would necessarily have been evidence of such a failure. (R p. 201 L. 6 - 13).

Natasha Smith, an independent witness, testified that she heard some machinery moving

around in the salvage yard while Mr. Hogan was in the salvage yard. Mr. James Corder, the only other employee of Appellant who was at the salvage yard, was in the shop talking with Natasha and her mother. Even Plaintiff's own expert witness agreed that, based upon the evidence available to him, it was most likely that Mr. Hogan was the one who set the sports utility vehicle up to be worked on. (R p. 157 L. 7 - 12).

Some times accidents occur for which no one can or should be blamed. The fact of injury, in and of itself, even absent explanation, does not necessarily mean that a party had been guilty of negligence. Kapuschinsky v. United States of America, 248 F.Supp. 732 (D.S.C. 1966) (quoting State of Louisiana Ex Rel. Francis v. Resweber, 329 U.S. 459, 462, 67 S.Ct. 374, 375, 91 L.Ed. 422) (internal citations omitted).

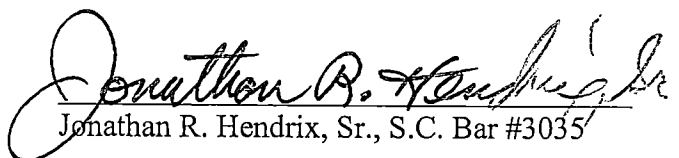
The Plaintiff's damages were substantial. Perhaps for that reason, the jury in this case overlooked the glaring lack of evidence as to what started the chain of events resulting in Mr. Hogan's injuries and decided that Appellant should be blamed.

Appellant submits that such is not a proper basis for imposing liability under the laws of the State of South Carolina. Appellant submits that, from the point of view of the Appellant, there can be no foreseeability or liability for an injury resulting from a completely unexplained "failure" of a properly working front-end loader to safely hold up the sports utility vehicle, allegedly causing the secondary safety system to come into play and fail. What, exactly, was the particular risk Appellant should have guarded against? Since this unexplained event could not be foreseeable on the part of the Appellant at the time that the Appellant acted in putting this system into effect, there can be no liability under the laws of this State.

CONCLUSION

For the reasons sited herein above, the Appellant respectfully requests that the court reverse and set aside the verdict and judgment appealed from and to remand the case to the trial court with the instructions to enter judgment in favor of the Appellant, Corder & Sons, Inc.

Respectfully submitted,


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Lexington, South Carolina
August 23, 2016.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

RECEIVED

SEP 09 2016

SC Court of Appeals

Case No. 2016-000259

Jerry Hogan

Respondent

Corder and Sons, Inc

Appellant

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT PROPERLY DENY APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOT WITHSTANDING THE VERDICT (JNOV)?

STATEMENT OF THE CASE

On September 6, 2013, Respondent Jerry Hogan commenced this action, alleging negligence against Appellant Corder and Sons, Inc. Respondent alleged personal injury caused by, among other allegations, Appellant directing Respondent to work under a raised load without the load being secured and Appellant's violation of S.C. Regulation 71-112A, resulting in a vehicle falling on Respondent. (R. p. 10, lines 8-10, 19-p. 11, line 3). Corder and Sons, Inc. answered, denying negligence and asserting negligence by Hogan. Appellant's Answer further alleged that Hogan was never injured and instead staged an accident. (R. p. 14, lines 5-9). The action was tried by a jury beginning on January 4, 2016. The jury found for Hogan and awarded him \$864,341.80. (R. p. 6, line 14). Corder and Sons promptly requested, and was granted, ten days to file post-trial motions. Appellant timely filed and served its post-trial motions. The trial court denied the motions by order signed January 19, 2016, filed January 22, 2106. On February 10, 2016, Corder and Sons, Inc. served the Notice of Appeal on Hogan.

FACTS

The Respondent's witnesses at trial were James H. Corder; Respondent Jerry Hogan; two women present at the incident location: Natasha Smith and Becky Davis; Respondent's rigging expert, Stephen Fournier; Respondent's wife, Melinda Hogan; two physicians who performed surgery on Respondent: E. Myron Barwick and Karl Lozanne; and Respondent's psychology and

vocational expert, Robert Brabham, Ph.D. Dr. Barwick's testimony largely concerned the initial stage of a surgery completed by Dr. Lozanne. The testimony of Respondent's spouse and Dr. Brabham chiefly concerned the amount of damages.

Appellant's Business Operations

Appellant Corder and Sons, Inc. owns a salvage yard in Lexington County. (R. p. 18, lines 23-25). Appellant's business is to buy wrecked vehicles and sell parts from those vehicles. (R. p. 19, lines 5-9). James H. Corder (hereinafter "Harold Corder") is the sole shareholder and only corporate officer of Appellant. (R. p. 18, lines 2-9). Harold Corder had worked for his foster father, who did some mechanical work, when he "was a kid." (R. p. 33, lines 8-19). He also worked on vehicles in the military. (R. p. 34, line 22-p. 35, line 3). Prior to incorporating and operating a salvage yard, Harold Corder was in the used car business. (R. p. 18, lines 17-19). Over time, he accumulated vehicles he bought for parts to fix the used cars, which led to the salvage business. (R. p. 33, line 22-p. 34, line 3). Prior to opening the salvage business, he neither took courses nor read any books on salvage yard set-up. (R. p. 33, lines 22-25; p. 34, lines 4-6). Appellant never employed a safety officer. (R. p. 34, lines 7-9). He taught Appellant's employees safety based on his own life experiences. (R. p. 34, lines 4-12). From 1989 to 2005, Harold Corder's son, Robert, worked for Appellant full time. (R. p. 217, lines 11-17).

When an engine was sold from a salvage vehicle, the entire vehicle was moved from the storage part of the yard to an area beside the garage. (R. p. 67, lines 6-10). The practice in Appellant's salvage yard was to move vehicles at the yard with a Caterpillar loader that forks instead of a bucket. (R. p. 19, line 20-p. 20, line 7; p. 271). The vehicle was moved to an area near the garage. (R. p. 22, lines 2-5). An employee would then loosen and remove the bolts, gas, line, linkage, and wire harness that were accessible from above the vehicle, while the

vehicle sat on the ground. (R. p. 66, line 22-p. 67, line 18). The work from above took about 30 to 40 minutes. (R. p. 67, line 23-p. 68, line 1). The vehicle would then be raised to access other parts that needed to be removed, such as exhaust and torque converter bolts. (R. p. 66, line 25-p. 67, line 22). The work underneath the vehicle took about an hour, depending on how rusty the bolts were. (R. p. 68, lines 2-5).

To access the lower part of the motor for removal, Appellant's practice was to raise the vehicle on the forks of the loader and have the employees stand underneath while working. (R. p. 22, lines 9-15). Appellant directed its employees to place a mobile home axle vertically under one fork of the loader as a "safety device". (R. p. 22, line 15-p. 23, line 10; p. 286). One end of the axle was placed under the loader's fork; the other end was placed into a wheel lying on a cement pad. (R. p. 23, line 16-p.24, line 12). One employee would hold the axle in place while Harold Corder would lower the forks. (R. p. 24, lines 21-24). Robert Corder testified that, with regard to setting the mobile home axle under the forks, "One man can't do it; it's a two-man operation." (R. p. 223, lines 12-15). Harold Corder testified that he or his oldest son would always run the Caterpillar loader. (R. p. 25, lines 8-13). He also, however, gave conflicting testimony that Respondent sometimes ran it. (R. p. 26, lines 3-16). Respondent presented impeachment evidence in the form of Harold Corder's prior deposition testimony that with respect to running the Caterpillar, "anytime there was something to be brought down or something, I always do it." (R. p. 26, line17-p.28, line 23).

With regard to when the use of the mobile home axle as a "safety device" began, Harold Corder gave conflicting testimony. He initially testified that the mobile home axle came into use after the previous forklift's hydraulic cylinder cracked. (R. p. 29, lines 20-25). Harold Corder then testified that he didn't know how long the axle had been in use. (R. p. 30, lines 1-6). Harold Corder then testified that he used the axle before the forklift cylinder cracked. (R. p. 31,

lines 6-7). Respondent presented impeachment evidence in the form of Harold Corder's prior deposition testimony that, with reference to the prior forklift "the cylinder cracked on it and so they got this thing and started using it." (R. p. 31, lines 19-25).

Respondent's Injuries

Respondent Jerry Hogan worked for Corder and Sons on two different occasions. (R. p. 36, lines 14-21). He worked primarily in the salvage yard, pulling motors or transmissions. (R. p. 65, lines 8-10). At the time of his injuries, just Harold Corder and Respondent worked at the business. (R. p. 65, lines 22-24). Respondent was injured on November 18, 2011, a Friday. (R. p. 70, lines 4-8). On that day, Respondent was an employee of Appellant, although Harold Corder disputed whether Respondent was supposed to be working at the time of the injury. (R. p. 82, lines 18-22). The day of his injury, Respondent started removing a motor from an SUV for a customer of Appellant. (R. p. 71, line 12-p. 72, line 8). He began right after lunch at noon and finished removing the bolts and parts on the upper part of the motor about one o'clock. (R. p. 72, lines 3-11). Respondent testified that Harold Corder then started the Caterpillar, raised up the vehicle, and Respondent placed the mobile home axle in place. (R. p. 72, lines 12-18). Respondent placed the mobile home axle the way he had been taught to place it. (R. p. 72, lines 19-23). The SUV was supported only by the mobile home axle and the loader forks. (R. p. 72, lines 24-25). Harold Corder did not stay to help with the lower half. (R. p. 132, lines 1-2).

Harold Corder alleged that Respondent left at noon to pull a motor for someone and he believed Respondent had left the property. (R. p. 39, line 23-p. 40, line 3). Harold Corder testified that the first time that he was aware Respondent had not left was when he heard him yelling. (R. p. 40, lines 10-14). Harold Corder testified that he did not hear the loader running that day. (R. p. 41, lines 11-13). Respondent impeached Harold Corder with his prior deposition testimony that Mr. Corder heard the loader running and went outside and saw Respondent

“piddling around there. I didn’t see him doing nothing; he was just piddling around and I went back in to there where the ladies was.” (R. p. 43, line 16-p. 44, line 1). At trial Harold Corder agreed that two persons were present at the time, Natasha Smith and her mother. (R. p. 41, lines 21-25). Natasha Smith testified about 15 or 20 minutes after she arrived, Respondent came into the office, spoke to Harold Corder, then left the office. (R. p. 99, lines 2-11). She and her mother continued to speak to Harold Corder, and then she heard Respondent screaming “help me.” (R. p. 99, lines 12-16). They ran out of the office and found the SUV on top of Respondent. (R. p. 99, lines 16-19). Only about 10 or 15 minutes elapsed between Respondent leaving the office and when the SUV fell. (R. p. 99, lines 20-23). Likewise, Becky Smith, Natasha Smith’s mother, testified that she went to Appellant’s salvage yard. (R. p. 110, lines 17-20). Ms. Smith recalls Respondent speaking in the office when Harold Corder was present. (R. p. 111, lines 6-16).

Respondent testified that he was underneath the vehicle when he noticed the SUV was leaning, was rocking, and the fork looked like it was going to come out from underneath the SUV. (R. p. 76, line 19-p. 77, line 4). Prior to this, Respondent had not hit or brushed against the axle or done anything to cause the SUV to fall. (R. p. 77, lines 5-15). The SUV fell onto Respondent and pushed him from his head straight down. (R. p. 77, lines 16-19). He felt immediate severe pain in his back. (R. p. 78, lines 7-8). An ambulance transported Respondent from the Appellant’s facility to Lexington Medical Center. (R. p. 79, lines 9-17). Respondent suffered a burst fracture of his lumbar vertebrae, requiring surgery on February 25, 2011. (R. p. 166, lines 19-21; p. 169, line 4-p. 170, line 21; p. 171, lines 3-9; p. 172, lines 3-14). Dr. Lozanne later performed a second surgery to stabilize Respondent’s spine on May 16, 2011. (R. p. 173, line 1-p. 175, line 4). Dr. Lozanne testified that Respondent’s injuries and the surgery were

caused by the injury he presented with on February 18—a car landing on him. (R. p. 176, line 24-p.177, line 14).

Evidence of Appellant's Failure to Maintain a Safe Work Environment

Respondent presented testimony at trial from Stephen Fournier, a civil engineer. (R. p. 113, lines 18-18). Mr. Fournier was qualified as an expert in the field of engineering and rigging. (R. p. 120, lines 1-3; p. 121, line 4). The field of rigging is a subset of engineering. (R. p. 119, lines 13-15). Rigging is the science of the process of safely lifting materials, whether by crane or, as in this case, by forklift type equipment. (R. p. 118, line 21-p. 119, line 12).

The chief deficiency Mr. Fournier identified in the work process utilized by Appellant is that employees should not work underneath an elevated load unless there is secondary bracing, cribbing, or blocking underneath the load. (R. p. 122, line 14-p. 123, line 3). Further, the blocking and cribbing should have at least two forms of support. (R. p. 123, line 13-p. 124, line 2). Cribbing or blocking is a series of 4x4s, 6x6s, or things of that nature interlaced and stacked “so that if a load falls, it only falls an inch or two down onto the cribbing . . .” (R. p. 138, lines 5-13). The two forms of support should be at “both sides of the load so you’re bracketing the load.” (R. p. 125, lines 6-10). Mr. Fournier testified that the mobile home axle used by Appellant was only a single point of support. (R. p. 124, lines 4-5). Further, positioning the mobile home axle under the fork at the machine end of the fork caused a cantilever action because the load is applied outboard of the means of support. (R. p. 124, line 9-p. 124, line 5). The principles of working under an elevated load apply equally to lifting from above by crane or from below by a modified loader configured like a forklift. (R. p. 122, lines 17-21).

Mr. Fournier testified that the procedure that Appellant designed and utilized was not safe. (R. p. 135, line 24-p. 136, line 2). He testified that the compressive strength of the mobile home axle was not the issue—it was the use of a single support, rather than two supports, and the

placement of the support. (R. p. 136, line 3-p. 137, line 12). With respect to the nature of the work in the salvage yard, the supports should have taken into consideration the horizontal movement of the load caused by the forces involved with dismantling the vehicles. (R. p. 139, line 20-p. 140, line 10). Appellant should have used either two sets of temporary cribbing or a stationary stand that was stable and structurally sound. (R. p. 137, line 25-p.138, line 4). Mr. Fournier testified that working under a suspended load is a recognized hazard that could cause serious injury. (R. p. 142, lines 2-4). In summation, Mr. Fournier testified that the cause of Respondent's injury was the failure to provide secondary support underneath the load and the mobile home axle was not an adequate secondary support. (R. p. 163, lines 18-24).

ARGUMENT

Appellant presents a straw man argument in alleging a failure of proof by Respondent concerning why the vehicle fell. The case presented by Respondent proves negligence without regard to why the vehicle fell. Respondent first will demonstrate how he presented evidence of negligence. Respondent then will respond to Appellant's argument that Respondent employed *res ipsa loquitor* in presenting his case.

Standard of Review

An appellate court will reverse the trial court's ruling on a directed verdict or JNOV motion "only where there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). The trial court must view all evidence and all inferences that can reasonably be drawn from the evidence in the light most favorable to the non-moving party. *Id.* When deciding a directed verdict or JNOV motion, the trial court "is concerned only with the existence or non-existence of evidence" and cannot consider credibility issues or conflicts in evidence or

testimony. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002). The appellate court therefore must determine whether any evidence existed on each element of the cause of action. *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989).

I. BECAUSE RESPONDENT PRESENTED EVIDENCE OF NEGLIGENCE BY APPELLANT, THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR DIRECTED VERDICT AND JNOV.

Respondent presented evidence of Appellant's breach of a duty to provide a place of employment which is free of recognized hazards which may cause death or serious physical harm to his employees, and that the breach proximately caused damage to Respondent.

The plaintiff in a negligence action must prove the familiar three elements: "(1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damages to plaintiff proximately resulting from the breach of duty." *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 133, 558 S.E. 2d 271, 275 (Ct. App. 2001).

Appellant Owed Respondent a Duty to Maintain a Place of Employment Free of Recognized

Hazards

The existence of a duty is an issue of law. *Ellis by Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). Whether the parties have the relationship involved in the duty is a question of fact for the jury. *See Fay v. Grand Strand Reg'l Med. Ctr., LLC*, 412 S.C. 185, 194, 771 S.E.2d 639, 644 (Ct. App. 2015)(considering the existence of a doctor-patient relationship). South Carolina has long recognized that employers owe their employees the duty to provide them with reasonably safe and suitable machinery and a party who goes to work for a company

has a right to assume that the company has reasonably safe and suitable appliances to do the work. *Jackson v. Southern Ry.*, 73 S.C. 557, 570, 54 S.E. 231, 235-36 (1906).

Alternately, the existence of a duty can be established by statute and the breach of the duty can be established by showing a violation of the statute. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 133, 558 S.E. 2d 271, 275 (Ct. App. 2001). The existence and violation of an agency regulation may establish the duty and breach the same as a statute. *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 512, 443 S.E.2d 406, 408 (Ct. App. 1994). South Carolina regulation charges employers with the duty to "maintain a place of employment which is free of recognized hazards which may cause death or serious physical harm to his employees and he shall comply with this regulation" 9 S.C.Code Ann.Reg. 71-112A (Supp. 2012).

The trial court charged the jury under *Jackson* and Regulation 71-112. (R. p. 253, lines 1-25). There were no objections to these charges. (R. p. 268, line 25-p. 269, line 12; p. 270, lines 1-4).

Respondent Hogan presented evidence that he was an employee of Appellant on the day of his injury. While Appellant contended that Respondent was not about the business of Appellant and was not supposed to be at the workplace, there was conflicting testimony on the issue. Respondent testified he was pulling a motor for Appellant's customer. Harold Corder's testimonies at trial and at his prior deposition were in conflict about whether he knew Respondent was present. Ms. Smith and Ms. Davis testified that Respondent spoke to Harold Corder minutes before hearing him scream for help. It therefore was within the jury's province to find that Respondent was an employee of Appellant, who owed Respondent the duty to keep the workplace free of recognized hazards which may cause serious harm.

Appellant Breached the Duty to Maintain a Place of Employment Free of Recognized Hazards

Respondent presented evidence of Appellant's breach chiefly through his rigging expert, Stephen Fournier. Respondent's expert opined directly that working under a suspended load is a recognized hazard that could cause serious injury. Respondent presented evidence that he was working under a SUV held up by the Caterpillar. Mr. Fournier testified that the critical failure—the breach of the duty—in this matter was when Appellant put Respondent underneath the raised vehicle without adequate support. He testified that the mobile home axle was not an adequate support. Respondent therefore met his burden of presenting some evidence on the element of breach of duty.

Appellant's Breach Proximately Caused Respondent's Damages

“As a general rule, the question of proximate cause is one of fact for the jury.” *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 136, 558 S.E. 2d 271, 276 (Ct. App. 2001). To prove causation, a plaintiff must demonstrate both causation in fact (“but for” cause) and legal cause. *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001). The touchstone of legal cause is whether an injury is foreseeable from the breach. *Id.*

With regard to cause in fact, Mr. Fournier testified that the failure to provide secondary support underneath the raised vehicle was the cause of Respondent's injuries. Respondent testified that the SUV fell on his head, pushing him to the ground, causing immediate severe back pain. He testified that he was transported by ambulance from the scene of his injuries directly to Lexington hospital. Dr. Lozanne testified that the Respondent's medical treatment and surgeries were caused by the injury he presented with at the hospital on February 18, 2011. Respondent therefore presented evidence of cause in fact.

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With regard to foreseeability, the injury suffered by Respondent is exactly the type of injury that adequate secondary supports are intended to prevent. Mr. Fournier testified: “that’s the reason you have the secondary support is because something can happen and, . . . before you put a person underneath a suspended load, that support system, secondary support system, needs to be in place in order for it to be safe and compliant.” (R. p. 158, lines 20-24). A reasonable employer in Appellant’s position could have foreseen that if there was not an adequate secondary support, a worker could be hurt by a falling vehicle. There was evidence presented that the mobile home axle came into use after a previously used forklift experienced a cracked cylinder. The Appellant’s use of the mobile home axle, although inadequate as an appropriate secondary support, demonstrated that the company had recognized the need for a secondary support. Respondent therefore presented evidence from which the jury could find that Appellant’s breach of its duty to provide an adequate secondary support proximately caused Respondent’s damages.

Respondent Presented Evidence of Each Element of Negligence

With regard to the elements of a cause of action for negligence Respondent presented evidence that: (1) Appellant owed a duty to provide a system of secondary bracing, cribbing, or blocking consisting of two points of support when employees are working underneath a suspended load; (2) that Appellant breached this duty by having Respondent work under a vehicle suspended without adequate secondary bracing, cribbing, or blocking; and (3) that the improperly suspended vehicle fell onto him, causing a fractured spine. Respondent presented evidence of each of the required elements of the cause of action. The trial court therefore properly denied Appellant’s motions for directed verdict and JNOV.

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II. APPELLANT MISIDENTIFIES THE DUTY AND BREACH AT ISSUE IN THIS MATTER IN ALLEGING LACK OF PROOF.

Appellant misapprehends the duty owed to Respondent in raising issues of proof.

Appellant focuses on the reason for the vehicle beginning to move, incorrectly suggesting the duty owed to Respondent is to provide any sort of support. Appellant suggests that Respondent must prove the reason for the SUV falling from the loader. Respondent need not demonstrate the reason for the falling vehicle, however, because Respondent did not proceed with a theory that Appellant was negligent in causing the vehicle to fall.

Respondent instead has proven negligence through the breach of a duty to provide an adequate secondary support. The negligent act occurred when Appellant designed a process that did not include adequate secondary supports. The need for the secondary support assumes that there may be a failure of the primary lifting mechanism. As the rigging expert, Mr. Fournier, testified, "that's the reason you have the secondary support is because something can happen and, . . . before you put a person underneath a suspended load, that support system, secondary support system, needs to be in place in order for it to be safe and compliant." (R. p.158 , lines 20-24). He continued: "With the secondary system in place, the accident would not have happened." (R. p. 159, lines 4-5). The duty owed to Respondent, the duty to provide an adequate secondary support, assumes that the load falls from the lifting device. The negligent act was to put Respondent under a falling vehicle in the absence of an adequate secondary support system. In denying Appellant's renewed directed verdict motion at the close of the evidence, the trial court recognized Respondent's negligence claim relied on the lack of an adequate secondary support and that the reason for the vehicle falling was immaterial. (R. p. 242, line19-p. 243, line 8).

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Nonetheless, Respondent presented evidence from which the jury could infer the reason for the vehicle falling. Respondent testified that he was removing a motor from an SUV for Appellant's customer just before he was injured. (R. p. 72, lines 3-8). This necessarily involved loosening the exhaust, torque converter bolts, and other valves and bolts while underneath the vehicle. (R. p. 66, line 22-p. 67, line 22). Respondent first noticed there was a problem when he saw the vehicle was leaning, "looking like it was about to slide off" the forks. (R. p. 76, line 19-p. 77, line 4). Respondent's expert testified the movements involved in loosening nuts and dismantling a vehicle cause horizontal forces that were not properly supported in the Appellant's rigging. (R. p. 139, line 20-p. 140, line 10). Mr. Fournier testified that the angle that the forks set down on the axle could explain the condition of the forks later titling:

Now we've heard that post-accident that, that this thing was, the forks were tilted. So if I take like my fork in this instance like this and I tilt it instead of bearing over the top. The whole think I now only have bearing and I'm actually creating a horizontal force on the top of that - - on the top of that stand and you get that horizontal force that I can kick that thing, kick that thing over. And then you have no support at all and then you can have addition[al] tilting action, you know of the fork.

(R. p. 137, lines 3-12).

Mr. Fournier testified that the forks were a smooth surface. (R. p. 137, lines 16-24). After the SUV fell, Harold Corder noted the forks were "tilted just enough for [the SUV] to slide down on its side." (R. p. 46, lines 18-25). From the combination of tilted forks, the forces applied in working on the vehicle, the smooth metal surface the SUV rested on, the vehicle rocking before it fell, and the precarious stability of the axle, there was sufficient evidence for the jury to infer that the SUV slid off the forks onto Respondent. Further, contrary to Appellant's assertion, Mr. Fournier testified that the final event of the SUV falling was not necessarily caused by a hydraulic leak in the loader. (R. p. 140, lines 19-24).

Because Respondent proved a different negligent act than the act Appellant focuses on, the strength of the primary system is immaterial. The reason for the SUV beginning to fall toward Respondent is immaterial. There was an unbroken chain of events between the negligent act of Appellant placing Respondent under a falling load in the absence of a secondary support and Respondent's injuries.

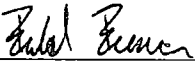
Respondent provided evidence of each element to prove his case and did not rely on res ipsa loquitor to prove his case. Res ipsa would only be an issue in a situation not present: if Respondent was injured in the presence of an adequate secondary support and could not explain the failure of the secondary support. That is not the case before the Court, however. The Respondent presented evidence of duty, breach, and proximate cause without resorting to the doctrine of res ipsa loquitor. Accordingly, the trial court properly denied Appellant's motions and properly submitted the case to the jury.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Circuit Court.

Respectfully Submitted,

September 8, 2016



Bradd W. Bunce
Post Office Box 1698
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(803) 771-2465
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

SEP 09 2016

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2016-000259

Jerry Hogan, ... Respondent,

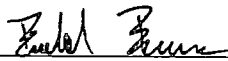
v.

Corder and Sons, Inc., ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

September 8, 2016


Bradd W. Bunce
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Attorney for Respondent

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jerry Hogan, Respondent,

v.

Corder and Sons, Inc., Appellant.

Appellate Case No. 2016-000259

Appeal From Lexington County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2017-UP-264
Submitted May 1, 2017 – Filed June 28, 2017

AFFIRMED

Jonathan R. Hendrix, of Hendrix & Steigner, of Cayce,
for Appellant.

Bradd W. Bunce, of Green Law Firm, LLC, of Columbia,
for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: Rule 50(a), SCRCP ("When upon a trial the case presents only
questions of law the [court] may direct a verdict."); *RFT Mgmt. Co. v. Tinsley &
Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012) ("A motion for a
[judgment notwithstanding the verdict (JNOV)] is merely a renewal of the directed

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verdict motion."); *id.* at 332, 732 S.E.2d at 171 ("The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt."); *id.* ("Moreover, '[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.'" (alteration by court) (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998))); *id.* ("An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below."); *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) ("An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control.").

AFFIRMED.¹

LOCKEMY, C.J., and HUFF and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

D. Garrison Hill, Circuit Court Judge

Appeal Case No. 2016-000259

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SC Court of Appeals

Corder & Sons, Inc. Petitioner,

v.

Jerry Hogan. Respondent,

PETITION FOR REHEARING

Jonathan R. Hendrix
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Pursuant to Rules 221 and 224, SCACR, Corder & Sons, Inc. petition this Court to rehear and reconsider its ruling in Corder & Sons, Inc. v. Jerry Hogan Opinion No. 2017-UP-264 (Filed June 28, 2017) in which this Court affirmed the Circuit Court's jury verdict in favor of the Respondent on the Appeal. Petitioner contends that, in reaching its decision, this Court overlooked or misapprehended the points set forth below:

- I. This Court inappropriately found that the jury verdict below should be affirmed even though a critical link in the chain of causation (that is, why the Caterpillar front-end loader failed to hold the load when there was absolutely no evidence presented of any failure on the part of that piece of machinery), leaving to conjecture or speculation whether the misfortune suffered by Mr. Hogan was the result of negligence of Appellant.

Our courts have steadfastly refused to impose liability when such a question is left to conjecture or speculation. Fletcher v. Medical University, 390 S.C. 458, 702 S.E. 2d 372 (Ct. App. 2010). The record in this case is, quite simply devoid of any proof as to how or why the front-end loader, fully capable of lifting and holding loads three times the weight of the sports-utility vehicle, did not hold the load safely in this particular instance. Such constituted a fairy of proof on behalf of the Respondent and his case should, therefore, fail.

- II. The Court erred in affirming the jury verdict in this case because the facts established by both direct and circumstantial evidence are that the primary safety mechanism (the front-end loader's unquestioned ability to hold far in excess of the weight of the sports-utility vehicle) did not fail, therefore the Court's affirmation is a tacit, if not expressed, recognition of the *Doctrine of Res Ipsa Loquitur*. South Carolina does not recognize the *Doctrine of Res Ipsa Loquitur*. Tucker v. Doe, 413 S.C. 389, 776 S.E. 2d 121 (2015), Watson v. Ford Motor Company, 389 S.C. 434, 699 S.E. 2d 169 (2010).

There is a gap in the causation in fact and legal causation of Respondent's injuries in this case created by the failure of proof as to what caused the load to shift or fall without any failure whatsoever on the part of the front-end loader.

There is no evidence in the record direct or circumstantial, to prove, beyond mere speculation, what caused the front-end loader to not hold the sports-utility vehicle. Respondent's expert, Stephen Fournier, was the only witness who attributed negligence to Appellant/Petitioner; but only because in his opinion, a secondary safety device (the axle used to help prop up the loader's forks) was inadequate. He could offer no opinion or evidence as to why the loader failed to safely hold the sports-utility vehicle. Mr. Fournier was not qualified as an expert in front-end loaders; only as an expert in "the field of engineering and rigging." (Rp. 120 L. 1-3). He could not offer any reasonable explanation as to why the front-end loader did not hold the vehicle safely. There was no evidence presented which would allow reasonable minds to determine that the reason the front-end loader did not hold the load was because of anything which was reasonably foreseeable. This expert admitted that his fault with Appellant was for not providing what he deemed an adequate "secondary mechanism" (Rp. 123 L. 4-16). Respondent's expert agreed that the front-end loader was capable of lifting and holding the weight of the vehicle on it. (Rp. 153 L. 6-22). The record is devoid of any evidence or testimony to explain how or why the front-end loader did not safely hold the load. There is ample evidence, both by testimony and expert testimony, that the front-end loader did not fail. (Rp. 200 L. 15 to P. 201 L. 9). The only other way for the loader to have let the weight down would have been for someone to have manually moved the levers controlling the "lifting arms" and fork. (R. 201 L. 10-13). Expert Fournier also admitted "... if the machine had held, I guess it [the accident] would not have happened..." (Rp. 159 L. 4-7) (bracketed language supplied).

It is undisputed that at the time of Respondent's accident, Respondent was alone with the machine. Mr. Corder was inside the shop talking to two ladies. The machine was heard being operated while Mr. Corder was inside the shop with the ladies. (Rp. 100 L. 1 to P. 1026.8).

Respondent's expert testified that, based upon the evidence known to him, "most likely" Mr. Hogan was the operator who set up the front-end loader and the vehicle it was holding just before the accident. (Rp. 157 L. 7-12).

Respondent had the burden of presenting sufficient evidence from which a jury could reasonably infer (without resorting to speculation or competence) that his injuries and damages were caused by specific negligent acts of omission or commission. Petitioner does not seek here to argue that an employer does not have a non delayable duty to provide a reasonably safe work place and suitable tools (Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E. 2d, 312, 317 (2000)); rather, that there is not proof from which a reasonable jury could infer that the front-end loader was not safe and that some anticipated flaw in the performance of the loader caused or contributed to the Respondent's injuries. Such proof is completely lacking in this case.

The proof does prove the reasonable likelihood that, most probably, Respondent brought on his own injuries. In any event, the proof fails as to what caused the front-end loader to properly hold th vehicle and, therefore, fails to prove Petitioner was negligent or that the loader was not reasonably (as opposed to perfectly) safe. The reasonableness off the System in place cannot be adequately judged without knowing what started the problem. Petitioner's duty was to have a reasonably safe work environment. The duty was not to have an environment in which no injury could ever occur. Here, there is a gap in the proof which can only be cured by speculation and/or conjecture. There is absolutely no proof that whatever may have caused the front-end loader to not hold the vehicle safely was a hazard which should have been anticipated and guarded against. The evidence presented (both direct and circumstantial) was that there was no failure on the part of the loader.

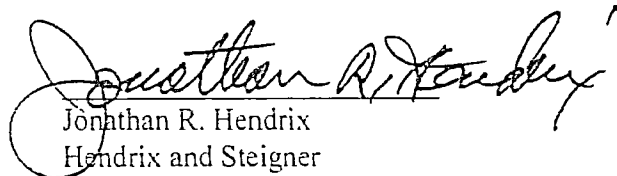
The fact finders are left to guess or speculate whether the primary system's not safely holding

the vehicle aloft was the result of some "normal" failure which was foreseeable. The evidence produced at trial is that the loader did not fail. To allow this verdict stand constitutes recognition, tacit or express, of the Doctrine of Res Ipsa Loquitur. This gap in proof should be fatal to Respondent's case and this case should be dismissed, with prejudice.

CONCLUSION

For the reasons stated, this Court should grant this Petition, rehear this matter, withdraw its prior opinion affirming the Circuit Court jury verdict and dismiss Respondent's case, with prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jonathan R. Hendrix", is written over the printed name and address.

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West Columbia, SC 29171
(803) 200-2970

July 10, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

D. Garrison Hill, Circuit Court Judge

Appeal Case No. 2016-000259

Corder & Sons, Inc. Petitioner,

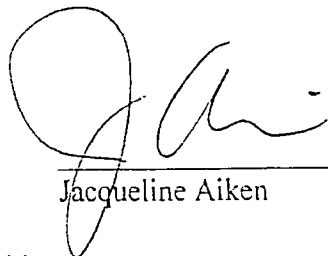
v.

Jerry Hogan. Respondent,

PROOF OF SERVICE

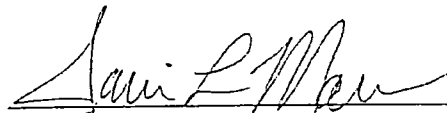
I certify that I have served the Petition for Rehearing on Jerry Hogan, Respondent, by placing same in the United States mail, postage prepaid on July 10, 2017 to his attorney of record, Bradd W. Bunce, 2821 Millwood Avenue, Columbia, SC 29202.

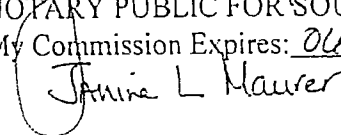
Dated: July 10, 2017



Jacqueline Aiken

SWORN TO and subscribed before me this
10th day of July, 2017.



NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 06/15/2026


Janine L. Mauer

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The South Carolina Court of Appeals

Jerry Hogan, Respondent,

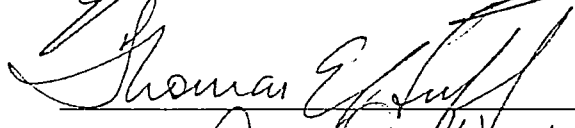
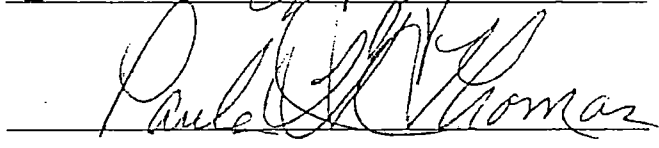
v.

Corder and Sons, Inc., Appellant.

Appellate Case No. 2016-000259

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

FILED

cc: Jonathan R. Hendrix, Esquire
Bradd W. Bunce, Esquire
The Honorable D. Garrison Hill

August 18, 2017

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